ROMAN PRIVATE LAW



BASED ON THE INSTITUTES OF GAIUS & JUSTINIAN.

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PREFACE.

This is designed to be a hand book for beginners. There are already in existence good many elementary books on Roman law, but they do not seem to supply what the law-students—especially the Indian students—in the first year of their legal course really want. Our students generally begin Roman law without any grounding in jurisprudence and consequently find the technicalities hard to comprehend. From my experience as a lecture on Roman law to the students reading for the Calcutta University law degree I find that there is still room for an introductory book.

As it is a beginners' book all minor details and nice discussions have been left out. The Roman law as found in the institutional treatises of Gaius and Justinian has been given in outline. The sources of information have generally been indicated in the body of the book. A bibliography would be out of place in a book like the present, and consequently it has not been supplied.

It may be remarked in conclusion that the book has grown out of lectures delivered in the classes and the lecture form has been purposely retained. To name all the authorities consulted would not be easy but I must mention Girard, Cuq, Mommsen, Karlowa, Ortolan, Walton and Buckland as authors who have been specially helpful.

Although primarily intended for Indian students it is expected that the book will help to introduce others to the law of the people that created jurisprudence.

S. C. B.

ROMAN PRIVATE LAW.

CHAPTER I.

INTRODUCTION.

Roman Law (*jus civile Romanorum or Quiritium*) is as old as the Roman people itself. In fact the name '*quirites*,' as the latest philological researches show, applied to those who formed the *curiæ* in ancient Rome. The curiæ, as will be presently seen, were the sub-sections of the three ethnic tribes—the Ramnenses, the Tatienses, the Luceres. These tribes according to tradition, grouped themselves into the various '*patricii*.' As the constitution of the patrician city changed, the law that governed the constitution changed as well. With the changes in the so called public law, the private law became considerably modified. The original inelastic system gave place to an elastic system of law. It is, of course, the business of the historian to go into the details of the political changes that

Roman Law.

Rome witnessed, but at the same time the lawyer, if he is to appreciate the significance of juridical changes, must not abandon the historical perspective.

History of Roman Law.

Historically considered, Roman Law may be divided into three periods corresponding to the three epochs of the Kings, the Republic, and the Empire. Sometimes the periods are compared to the three marked stages in human life—infancy, manhood and senility. In what follows Roman Law will be considered in the three divisions just named.

First period —Infancy of Roman Law.

Nothing is known definitely about the origin of the Romans. The earliest history of the city as well as that of the citizens is wrapt in obscurity. The legendary date of foundation of the city is 754 B. C. About the middle of the 8th century B. C. a band of colonists planted a settlement on the northern frontier of Latium, 'choosing as the site of their new home the central height in a group of hills on the left bank of the Tiber, about fifteen miles from the river-mouth.' (Havell, Republican Rome.) The original Latin population, according to

tradition, underwent an ethnic change through the infusion of Sabine and Etruscan blood and finally appeared as the Romans. This tripartite origin of the people explains, Festus supposes, the threefold division of the Romans into the Ramnenses, the Tatienses and the Luceres.

The patricians.

The three tribes mentioned above were grouped into *curiæ*, each tribe being divided into 10 curiæ. Each *curia* was subdivided into *decuriæ* and each decuria into *gentes*. The aggregate of gentes, who were connected through the community of family name and family worship, formed the patrician or *patricii*. They were the citizens proper in ancient Rome.

The plebs.

The patricians were the dominant class. There was an inferior class, a subject class prohibited from alliance with the *patricii*, neither admitted to the rights nor to the laws of the citizens. They lived attached to and protected by the different families of the patricians. These were the plebs or the plebeians.

The clients.

Besides the patricians and the plebeians there was a third class of people in the ancient city. This class

formed the clients. The exact position of the clients in the Roman society has not been definitely stated by the authorities. According to Cuq the client was 'a free but non-citizen inhabitant of Rome.' The state did not exist for the client. Perhaps he occupied a position intermediate between the plebeian and the slave.

The slaves.

Finally there was a fourth class of people — the *servi* or the slaves—who formed no part of the State, were without any civil rights and were regarded more as chattels than men.

The patrician city.

The people in the ancient patrician city was thus divided into classes differing widely in their condition. At the top were the patricians with full civil rights, the intermediate places were filled by the plebeians and the clients, while the lowest position was occupied by the rightless and consequently dutiless inhabitants called the slaves. Such was the constitution of the society where the *Jus civile* had its birth.

Family.

The social unit in ancient Rome was the family. At the head of the family was the *paterfamilias*. His power

was supreme in the family; the wife, the children, the slaves were under the absolute power of the head of the family. The *pater familias*, when he liked, consulted his kinsmen as to matters affecting the interest of the family but he was not bound to take their advice.

The State.

The state was modelled on the family. The king was the head of his family of subjects. Kingship, however, was elective. On the death of a King an *interrex* was chosen by a council of the people and the nominee of the interrex generally became the king. Just as in the family the pater-familias sometimes sought the advice of his kinsmen so in the state the king occasionally consulted a body of elders known as the Senate, but like his prototype in the family he was not bound to follow the counsel of the Senate.

Religion.

Religion played a great part in the state as well as in the family. Every important act in public life had to be sanctioned by the priest. The priests were chosen from among the partricians who guarded with care the mysteries of religion. There was a hierarchy of priests who were

classed as (1) the *pontifices*, six in number, with a president called the *Pontifex maximus*. These formed the pontifical college having a jurisdiction over crimes against religion; (2) the *augures*, also six in number, who directed the auspices and had a great influence over the popular assemblies in ancient Rome; (3) the priests charged with the care of sibylline books. Besides these there were special priests for directing international matters and priests for particular divinities, e.g., the *flamines* of Jupiter, Mars, &c.

Public Domain.

The material prosperity of the Patrici was due to their possessing the public domain,—the *ager publicus*. When the Romans conquered a new province they divided a portion of the land amongst the soldiers who had fought successfully. This portion was the private property of the soldiers. The state colonised the rest of the conquered territory and the land was held by the colonists free of any charge. This land formed the ager publicus. It is the general opinion that the ownership of this land lay in the state, the colonists had only the possession. Hence the name the public or the state land.

The most important assembly in the kingly period was the one of the patricians known as the comitia curiata. This assembly was composed of the curies into which the patrician population of Rome was divided. These comitia were religious and aristocratic meetings convened for electing sacerdotal officers and passing legislative measures. The curiate assembly was, in fact, the most important legislative assembly although it generally gave opinion on a definite concrete measure, e.g , whether x may be allowed to adopt y. The laws passed by the comitia curiata may be compared to private Acts of modern times.

The Comitia Curiata.

Unlike the members of modern legislative assemblies the members present at the comitia curiata did not vote individually. They voted in groups. The electors were grouped into *curies*, each curia having one vote (of course within the curia the question had to be decided by individual voting). The order in which the curies voted was determined by lots. The clients could not vote.

The Method of Voting.

[It may be useful to note how the method

of voting may affect the result. Let us suppose that three curies C_1, C_2, C_3, are present in the comitia, and further C_1, has 150 men, C_2, 200 men, C_3, 240 men. Now according to group method of voting the result may be thus tabulated.

	Yes	No	Result.
C_1	78	72	+1
C_2	40	160	-1
C_3	121	119	+1

Here +1 means 1 vote for the proposed measure, -1, one vote against it. The result is 2 votes for and one vote against the measure. Therefore the measure is carried. But if the individual votes are counted we get by adding up the column under Yes and that under No, 239 votes for the measure and 351 against it and the measure is disallowed, a result exactly the opposite of the former].

Sources of Law.

The question that is of the utmost importance to the jurist is Whence did legislation generally flow during the Regal period? Where the sources many? The comitia curiata, although an important source of law, did not pass

general legislative measures. That is to say although the comitia might pronounce its opinion on the legal validity of adoption in a particular case it did not pass a *general* law of adoption. Every case of adoption had to be sanctioned by it de novo. Some however are of opinion that the comitia did pass general laws and mention the so-called *leges regiæ* (royal laws) as examples of laws passed by the comitia at the instance of the kings. But as Girard has pointed out there are two principal objections to this view :--(1) The collection known as the *Leges Regiæ* and attributed to Sextus Papirius is an apocryphal production. (2) The leges regiæ consist mainly of religious rules which according to the authorities, were never objects of popular voting. Hence one may say that custom was the only source of law during this period. The laws were all unwritten (non-scripta.)

Plebeian progress; comitia centuriata.

As time went on the plebeians grew in number and began to clamour for a share in the government of the city. Towards the close of the regal period the claims of the plebeians were partially recognised by Servius Tullius who

distributed the people, for fiscal and military purposes into new groups called the *centuries*. These centuries met in an assembly termed the comitia centuriata.

Constitution and power of the comitia centuriata.

The military organisation devised by Servius was intended to displace the old comitia curiata where birth and not wealth counted. 'Before the time of Servius the whole weight of public service fell upon the patricians, they alone served in the army and they alone were charged with the war tax. The new organisation, plutocratic in design, tended to remove this anomaly. The three old tribal divisions were replaced by four tribes including the whole free population of Rome.' (Havell). The tribes were divided into classes and centuries.

The classes were five in number. Those whose income fell below a certain sum were not regarded as members of any class. The division was in accordance with the following scheme of property qualification :—

The First class consisted of those who possessed land to the value of ... 100,000 asses

The Second Class ... 75,000 asses

The Third Class ... 50,000 asses

The Fourth Class ... ... 25,000 asses
The Fifth Class ... 11,000 or 12,500 asses

Each class was subdivided into 'centuries.' In all there were 193 centuries, (some say 194 and others 199.)

It may be noticed, as Ortolan has observed, that the principle of suffrage in the comitia centuriata was to take as a unit the vote of the century and to give more centuries and consequently more votes to the first class which represented the wealthier though less numerous part of the population, to give in each class to the seniors, though fewer in number, as many centuries and consequently the same votes, as to the juniors; and lastly to throw into a single century the entire body of the proletariate.

The comitia centuriata enjoyed the same powers as the comitia curiata. They voted definite concrete measures and never passed general laws. The patricians as well as the plebeians could sit and vote in the comitia centuriata.

The plebeians as a class did not profit much by the reforms of Servius. These reforms were favourable to rich but to the poor they were as good as non-existent, and

The second period. The Republican Period—Manhood.

majority of plebeians were poor. The unsatisfactory state of affairs lasted till the middle of the Republican period which roughly speaking began in 510 B.C. About this time the king was replaced by two consuls appointed by the people. The consuls chose the members of the Senate which now became an important executive body. The government of the state was carried on by the consuls with the help of the Senate. In times of crisis a magistrate called the *Dictator* was appointed The dictator generally held office for six months but during this period he was the supreme person in the state.

The struggle between the two orders.

The first endeavour of the plebeians, as soon as the old regime gave way to the new, was to get the severe laws regulating the relations of the debtor and the creditor abolished. These laws pressed the plebeians hard. The contract of debt was entered into by a process called the *nexum*. [A nexum was a transaction per aes et libram (by means of copper and scale). Five witnesses and a balance-holder called the *libripens* were necessary. The metal borrowed was weighed out, coined money having not

yet come into use.] A certain period of grace was allowed after the debt had become due and if the creditors were not paid at the end of this period of grace, they could seize the person of the debtor, make him their slave, sell him across the Tiber or cut his body into pieces and divide the fragments among them.

The impoverished condition of the majority of the plebeians on whom the hardship of the law of nexal debts generally fell brought about a social crisis. The poor plebeian demanded of the rich patrician that this unfair law should be repealed. The partricians, however, did nothing to relieve the plebeians who, in retaliation, marched out of Rome in a body to settle on the Sacred Mount (Mons Sacer). The patricians could not very well perform their social and domestic duties without the help of the plebeians and consequently they had to come to terms with the latter. The first important concession made to the plebeians was that the latter would have two magistrates elected from among them to look over their interests. These magistrates were called the *Tribunes of the plebs.*

The tribunes were elected annually. Their

The tribunes and the *concilium plebis.*

persons were inviolable. They had the right of *veto*, *i.e.*, the right of stopping by their intercession all actions of their magistrates in Rome. The veto was essentially a nagative power. The tribunes had also the positive power of convening, whenever necessary, an assembly of the plebs called the *concilium plebis.* This assembly was a meeting of the plebeians and it could pass resolutions which were binding on the plebeians alone. These resolutions came to be known as the *plebiscita.*

Comitia Tributa.

According to some a new legislative assembly known as the *Comitia Tributa* appeared after the introduction of the tribunate. Rome was divided into 30 districts—4 urban and 26 sub-urban—and the inhabitants of these districts summoned by magistrate gathered together at the *forum* when occasion demanded. The comitia tributa were constituted on the principle of local division, hence the epithet tributa (tribus means *districts* and not *tribes*). Nothing is known definitely about the legislative methods of this assembly. In fact a great body of jurists are of opinion that no such

comitia existed, although Cuq observes that the allusion in the XII Tables to a comitiatus maximus (a greater assembly) implies the existence of a comitiatus minor (a smaller assembly) and this latter was probably the district assembly (the comitia tributa.)

Ascendancy of the plebeians; publication of the XII Tables.

Notwithstanding the concessions made to the plebeians their condition was not materially improved. In addition to their political disability they suffered greatly from the uncertainty of the customary laws. They demanded that the laws should be collected together and made public. The patricians could not long withstand the just demands of the plebeians. According to tradition a commission was sent to the Greek colonies of Southern Italy for a survey of the Greek laws. When the commissioners returned (about 452 B.C.) ten magistrates (called the Decemviri legibus scribendis) were appointed to put down the laws in writing. At first the laws were written on ten tablets of wood and these tablets were hung up at a conspicuous place in the *forum*. Subsequently two more tablets were added. The laws were confirmed by the comitia

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centuriata and came to be known as the laws of the XII Tables. This Decemviral code, (as the XII Tables are collectively named) was published in its final form in 449 B.C.

The Decemviral code in its entirety has not yet been found. About 40 provisions have been recovered in the exact words of the original text. However, with the aid of these fragments, it is possible to understand the character of the laws of the period under consideration.

Fragments of the XII Tables.

The provisions of the Tables may be grouped under two heads :—

(1) Public Law (2) Private Law. Under the first head fall the rules regarding the sovereignty of the popular assembly and matters of criminal and administrative law. Under the second head fall provisions regarding paternal power, nexal debt, intestate succession, etc.

The rules are expressed in a rhythmical form. The spirit of these laws is singularly Roman—the patriarchal family with the pater familias as the absolute chief, the every day duties of life determined and fixed by inflexible rules, the archaic process of enforcing

the law, all these purely Roman characteristics are reflected in the laws of the XII Tables. [A few of the important provisions showing the nature of the XII Tables are given below :—

Si in jus vocat ni it, antestator ; igitur em capito. (If you summon a man before a magistrate and refuses to go, take witnesses and arrest him.)

Aeris confessi rebusque jure judicatis triginta dies justi sunto. (In case of debt either upon confession or judgment, the debtor shall have thirty days' grace.)

Tertiis nundinis partis secanto. (After the third market day the debtor's body may be divided.)

Si pater filium ter venum diuit, filius a patre liber esto. (If the father sells his son three times, the son shall be free from *patria potestas*).

Uti legassit super pecunia tutelave suæ rei, ita jus esto. (The testament of the father shall be law as to all matters concerning property and tutelage). This is known as the 'uti legassit' clause.

Si intestato moritur, cui suus heres, nec sit, adgnatus proximus familiam habeto. (If any

one dies intestate and leaves no suus heres, the nearest agnate shall succeed.)

Usus auctoritas fundi biennium......caeterarum omnium annuus......(In the case of lands possession for two years, in the case of all other things one year, vests the property.)

Si mem brum rupit, ni cum eo pacit, talio esto. (Retaliation against him who breaks the limb of another and does not offer compensation.) This is the famous lex talionis.]

The social fight.

The struggle between the patricians and the plebeians went on because even by the publication of the XII tables the plebeians did not get all that they wanted. The social fight now centred round three principal objects :—(1) The removal of marriage restrictions that prevented the fusion of the two orders. (2) The recognition of the plebiscita as laws. (3) The eligibility of the plebians for the high offices of the estate. The fusion of the two orders was brought about by a law called the lex Canuleia 446 B.C. The plebiscita came to be recognised as laws after the passing of the lex Hortensia in 287 B.C. The conquest of magistracy was gradually brought about. At first the plebeians were given the power of

choosing from amongst their order military tribunes with consular powers. In 367 B.C. a famous law called the lex Licinia opened the consulate to the plebeians, but the major part of the consul's power was given to the praetor and the curule ædile—two new officers elected from amongst the patricians. It was not till about 254 B.C. that the plebeians became eligible for all the high offices of the state.

The Praetor.

The praetor was the central figure in the republican Rome. He had executive, judicial and legislative powers. The praetor exercised his legislative powers by issuing edicts. The power to issue edicts was conferred on him as a special privilege or imperium. In virtue of his imperium he was said to possess the *jus edicendi* (*i.e.*, the right of issuing edicts). The edicts introduced new laws or reformed the old ones.

When the praetor took his charge he published a body of rules according to which he administered the law and justice during his tenure of office. These rules were put down on a tablet called the *album* and formed the praetorian edict. The edicts were divided into two classes (1) *Edictum Perpetuum* (*i.e.*, perpetual

edict). (2) *Edictum repentinum* (*i.e.*, occasional edict). The perpetual edicts were, however, perpetual in a relative sense, they were in force during the year of office of the praetor who had published them. The edictum repentinum—the occasional edict—was published, as its name implies, when occasion demanded, *e.g.*, either on an emergency or for some comparatively unimportant purposes as the declaration of an exhibition, the announcement of game laws &c.

[It may be noted in passing that some authorities deny legislative powers to the praetor. They seem, however, to refer to the powers *directly* legislative, because it is admitted by all that the *jus edicendi* included the *jus addendi* and the *jus corrigendi*.]

The jus honorarium or the jus prætorium.

The new body of laws that arose through the activity of successive praetors came to be known as the *jus honorarium* or the *jus praetorium*. The jus praetorium is supposed to bear resemblance to the English Equity. But the Equity of Rome, it must be remembered, "even when most distinct from the *jus civile* was always administered by the same tribunal. The praetor was the chief Equity

judge as well as the common law magistrate." (Maine).

Sources of law.

Towards the end of the republic legislation emanated from four different sources viz :—

(1) The comitia centuriata. These passed the *leges i.e.*, laws proper, proposed by the consuls or other senatorial magistrates.

(2) The concilium plebis. The plebeian council passed the plebiscita binding on the plebeians alone. The plebiscita also came to be denoted as the 'legs,' but the term lex as applied to a plebiscitum had the generic meaning of law. A true lex is distinguished from a plebiscitum by the peculiarity of its title. In the case of a lex the names of both the consuls responsible for its introduction are present in the title *e.g.*, Lex *Valeria Horatia* while in the case of a plebscite only one name is present *e.g.*, *Lex Aquilia.*

(3) The Edicts of the magistrates. Through the edicts the civil law was considerably modified.

(4) The responsa prudentum. Literally the expression means the answers of the learned in law. The jurists in ancient Rome had the three-fold duty of (1) Respondere—(giving

opinions on disputed legal points). (2) Agere, (acting as counsel). (3) Cavere, (drafting documents indicating the forms of contracts etc.) They added greatly to the body of laws through the 'responsa' which they were entitled to give to any one who sought for them. These responsa were recognised by the judicial tribunals and called the '*Sententiæ receptæ*' (*i.e.* accepted opinions).

Position of the nexal debtor.

About B.C. 325, a famous law known as the lex Poetelia Papiria was passed. This law forbad the execution of judgment debt by personal attachment. Even if the goods of the debtor were not sufficient to meet the demands of the creditor, the utmost the latter could do was to take the debtor home and employ him in manual labour for a fixed period. At the end of the period the nexi (as the debtors were called) were supposed to have worked off their debt.

Third period The Imperial period.—Senility.

The Republic after an existence of over four hundred years gave place to the Imperial regime. It is generally asserted that Octavius Cæsar, the grand nephew of Julius Cæsar established the true Empire in 31 B.C. He assumed the title of Augustus and collected

into his hands all the powers of the state, although, theoretically, the governmental powers were divided between the Senate and the Emperor. The Roman provinces were classed into the senatorial provinces and the imperial provinces ; the income from the former were to the public treasury (*ærarium*) and that from the latter to the imperial treasury (*fiscus*).

Sources of Law.

To the existing sources of law two other were added viz. the senatus consulta and the constitutions of the Emperors. The sources of law during the third period of Roman Law were then (1) Leges. (2) Responsa Prudentum. (3) Senatus consulta. (4) Imperial constitutions. The plebiscita were no longer distinguished from the leges and the edicts of the praetors as will be presently seen ceased to be the instruments of legal reform. The leges were not so frequently passed as in the preceding period. The responsa prudentum assumed an importance due to an ordinance of Augustus. Pomponius says "Augustus conferred on some of the jurists a *permissio jura condendi* (*i.e.*, the power to impose on the judge the authority of their opinion). The jurists were divided into two classes—(i) those with the permissio, (ii) those without it. The

opinions of the former alone were the *sententiæ receptæ.*"

Senatus consulta.

The Senatus consulta were the decrees of the Senate. At the beginning of the Imperial regime these were important sources of law. They were measures passed by the Senate at the instance of the Emperor. The measure was usually introduced by a speech from the throne called the *Oratio.* When the authority of the Senate gave way to that of the emperor the *oratio* and not the decree of the Senate became the source of law.

The constitutions of the Emperor.

The constitutions were :—*Oratio, Edictum, Decretum* and *Rescriptum.* Rescriptum was subdivided into *Mandatum* and *Episiola.*

Oratio was the speech from the throne introducing a new law.

Edictum. This must be distinguished from the edict of the magistrates. It was a general legislative measure passed by the Emperor himself.

Decretum. This was a judgment given by the emperor in a law-suit brought before him as the supreme magistrate. A decretum

(decree) was binding on all the judges and magistrates.

Epistola and mandatum were species of rescriptum. When the emperor gave an opinion on a point of law referred to him by a state officer, *e.g.*, a magistrate, the rescript was called a mandatum, while an epistola was an opinion of the emperor given to a private individual or a corporation.

Edictum perpetuum.

The edict of the praetor consisted of two parts—(i) the part which was brought forward from the edict of a former praetor, called the *edictum tralatitium* (ii) the part due to the new praetor called the *edictum novum.* With the succession of praetors the edicta nova grew in bulk till by orders of Hadrian all the edicts were collected together and published by Salvius Julianus. The consolidated edict came to be known as the *edictum perpetuum.* Praetors were no longer allowed to issue new edicts. Jus edicendi was withdrawn and consequently the prætorian edict ceased to be the source of new legislation. So the Equity of Rome was transformed into *jus scriptum* (the written law) and lost in a great measure its original elasticity.

Schools of Jurisprudence.

During the imperial period arose the two famous schools of law—the Proculian school and the Sebinian School. The former took its name from Proculus who was a disciple of the jurist Labeo; the latter derived its name from Sabinus who was a disciple of the jurist Capito.

The Law of citation.

The rise of the famous schools of jurists necessarily led to the publication of conflicting opinions on the same points of law. This necessitated a rule of choice, consequently a law known as the law of citation was passed. This measure is attributed to Valentinian and the law itself is called the Valentinianian law of citation although it was Theodosius II who was truly responsible for this law. It runs as follows:—

"We confirm all the writings of Papinian, Paul, Gaius, Ulpian and Modestin. If there be any disagreement between these on a point of law, the opinion of majority would prevail; if no majority be obtainable the judge should follow the opinion of Papinian."

Law reforms of Justinian.

The imperial period closes, so far as the development of Roman Law is concerned, with what is known as the Byzantine period. This period

is characterised by the legislative activity of Justinian and is fitly termed the period of Justinian. Roman law after having attained its fullest development was now approving senility. The important treatise of this time are :—

(1) The Codex or the code of Justinian. It is a collection of imperial constitutions down to the time of Justinian.

(2) The Digest or the Pandects—This is a collection of opinions of distinguished jurists.

(3) The Institutes of Justinian—This is an elementary text-book of Roman Law.

(4) The Fifty decisions—These were collected by the orders of Justinian and published in a book form. They settled several disputed question of Law.

(5) The Novels or *novellæ constitutions*—These were new constitutions due to Justinian himself and completed the *Corpus Juris.*

The *Corpus juris civilis* (*i.e.* the Institutes, the Digest, the Code, the Fifty Decisions, and the Novels of Justinian) was the form in which the Roman Law was received in the fifteenth century as the common law of South-Western Europe. Thus Rome completed her juridical conquests a thousand years after she had ceased to exist.

CHAPTER II.

DIVISIONS OF ROMAN LAW.

Law of Persons.

Public Law and Private Law.

Roman Law is divided into Public and Private. Public Roman Law deals with administrative and legislative functions exercised by various parts of the Roman State. It deals also with the powers, duties and rights of public officials. In a word public law is concerned with the constitution of the state and the relations between the government and the individual members of the community. Private Roman Law (with which we are concerned in this book) deals with the rights, duties, capacities and incapacities of private individuals. In other words it is the law of private status. According to the institutes of Justinian private law may be classed under the three heads of persons, things and actions. It is more conducive to clearness, however, to treat the private law under the heads of the law of persons, the law of things, the law of obligations, the law of succession and the law of actions; the last head dealing with adjective law.

Law of persons.

The law of persons considers the rights, duties, capacities, and incapacities of individuals in themselves and in their relation to the family-group. The family consists of individuals connected by a real or fictitious tie of common descent. The group of individuals was arbitrarily limited otherwise all kinsmen would together form only one family.

Nature of Personality.

Persons are divided into (1) Physical or natural persons; (2) Artificial or jural persons. The essential mark of a person is that he is a right-and-duty-bearing entity. In Roman Law the *persona* of a natural person was identified with his *status*. The status was considered under three heads (*tria capita)* viz., (a) the status of liberty (*status libertatis*), (b) the status of a citizen (*status civitatis*), (c) the status of family (*status familiae*). An individual having these three status (or *capita*) was a fully qualified person. An artificial person or moral person did not necessarily possess the tria capita. In fact a corporation (the moral person *per excellence*) had no family.

The law of persons [*i.e.*, natural persons. In what follows this is always implied] may

Divisions of the law of persons.

conveniently be divided into four parts, each part answering to one or other of the following questions :—(1) Are the persons free or unfree? In the case of free persons are they born free (*ingenui*) or have they been made free (*libertini*)?

(2) Are the free persons citizens or non-citizens?

(3) Are they *sui juris* (independent) or *alieni juris* (under other's power, dependent)?

(4) If sui juris are they fully independent or are they under a guardian (*tutor*) or a care-taker (*curator*)?

First Division of the Law of Persons—Slavery.

The fundamental division of persons is that into free and unfree. The law of the unfree. deals mainly with slavery. Slavery is defined

Slavery.

by Justinian as, "the condition of being under some body's complete power." This definition as Buckland has shown does not cover all cases of slavery. Because the slave was not necessarily always subject to the power of an owner (*dominus*). In fact there were four classes of slaves without an owner. They were (i) the slaves abandoned by their owner. These were *res nullius* (no one's property). (ii)

Servi pœnæ (*slaves of penalty*). Till the time of Justinian condemned criminals were regarded as "slaves of penalty." They were without any master. (iii) Slaves manumitted by their owner while some other person had a right in them. (iv) A free man who allowed a usufruct (*i.e.* the right of enjoying the labour) of himself to be given by a fraudulent vendor to an innocent buyer was an owner-less slaves so long as the usufruct lasted. Therefore as Buckland says, "It would seem that the distinguishing mark of slavery in Rome is some thing else than mere subjectivity to another's power and modern writers have found it in rightlessness. Over a great range of law the slave was not only rightless but also dutiless." A slave was in other words, a *homo* (an individual) without *persona* (personality) and as such was relegated to the category of *res* (things).

Sources of slavery.

According to Justinian slaves are either born or become so (Servi aut nascuntur aut fiunt) *i.e.* the factors determining slavery may be (i) natal (ii) post-natal.

Natal conditions.

The general rule regarding birth as a determinative factor of salavery is thus expressed by Ulpian—"If a child is born in lawful wedlock it follows the

conditions (free or unfree) of the father as the moment of conception. If born out of wedlock the condition of the mother at the time of birth, determines the conditions of the child. Justinian altered the second part of the rule by laying down that if the mother had been free at any time between conception and birth the child was an ingenuus (a free-born individual).

Post-natal conditions.

Post-natal facts determining slavery may be divided into two classes. (i) The facts derived from the *jus gentium* (the law of nations) (ii) those derived from the *jus civil* (the Roman civil law). According to the *jus* gentium any one taken captive in war became a slave of the conqueror. The consequence of captivity as a result of war was, however, modified by two theories—(i) the theory of *post-liminium*, (ii) the theory of *lex Cornelia.* According to the first theory as soon as a captive in war returned to Rome he became a free person. Once a slave was *not* always a slave in this view. After the return of the captive slave to Rome no formal manumission was necessary to reinstitute him into the position he had occupied before he lost his freedom. According to the second theory

(derived from the Cornelian law forbidding falsification of wills) all the acts performed by a captive before his captivity were legally valid and the will of a captive dying in captivity had full legal effect. In other words slavery as a result of captivity in war did not affect the validity of juristic acts so generally as the slavery in *jus civile.*

Slavery in jus civile

The most important rules of Roman civil law regarding enslavement were the following :—

(1) If a free man allowed himself to be sold as a slave by an accomplice, in order to share the price, he forfeited his liberty.

(2) A free woman who cohabited with a slave was liable to be reduced to slavery after she had been warned three times. This was under the Senatus Consultum Claudianum, repealed in the time of Justinian.

(3) The *incensus* (*i.e.* the person whose name did not appear on the sensus roll because he had avoided the census in order to escape from military duties,) was reduced to slavery.

(4) The ungrateful freed men—The freed men (*libertini*) owed their patrons certain duties;

If they failed to perform these, they could be re-enslaved.

(5) The slaves of penalty—Those who were condemned to work in the mines were called the slaves of penalty (*servi poenae).* These were owner-less slaves. Penalty was regarded as their master, hence the name. This form of slavery was abolished in the time of Justinian.

Condition of the slaves.

The position of the slaves was fixed either by civil law or by custom. The civil law considered one or other of the following relations :—(a) The relation of the slave to his master, (b) the relation of the slaves to one another, (c) the relation of the slave to third person.

Master and Slave.

(a) The slave having neither of the three *capita—libertas civitas* and *familia* —was not a person in the jural sense of the term. As against his master he had no rights, although his master had every right over him. The power of the master in relation to the slave was called the *dominica potestas.* During the republican period the master had the legal right of alienating the slave, letting his services, punishing him in whatever way he liked. The slave could not

be the subject of any right real or personal. All the property that came to the slave belonged to his master. The slave could not appear as a plaintiff or a defendant in the law courts.

Relation of slaves inter se.

(b) As to their relation *inter se* all the slaves of one and all same master occupied the same position. So when the master authorised one of his slaves to perform a juristic act for him (*e.g.* to accept an enheritance) the slave could not utilise this delegated *persona* for the purpose of entering into a juristic relation with his fellow slaves, because no one could enter into a juristic relation with himself. In the case of fellow slaves the personality, being that of their master, was one and the same whichever slave might have been clothed with it. As a corollary it follows that the slaves of different masters when authorised by their respective masters, could enter into juristic relations (*e.g.* contracts) with one another. Again the slave had not the *status familiae ;* consequently the union of a male and a female slave was not a marriage in the eye of the law, because throughout the Republic the Roman law recognised only the *justæ nuptiæ* (*i.e.* the marriage,

between free Roman (citizens). The union of slaves was known as *contuberuim*, a *de facto* and not a *de jure* marriage. The contubernium did not produce any of the legal consequences of marriage proper. The slave husband had no *manus* over the slave wife not any *potestas* over the issue. The husband could be separated from the wife by the master of the slave and even the union could be dissolved by the master at his will.

The slave and the third party.

(c) [' Third party ' here refers to one who is not a slave or the master of the slave whose relation with other is considered.] Although the Roman law denied legal personality to a slave it could not but accept the fact that the slave was a man (*homo*)—a being with intelligence and volition. Thus we find that the slave was under delictual obligation in certain cases. Moreover the slave frequently acted as an agent of his master for buying things, for accepting profitable inheritence &c. In other words on many occasion the slave was practically regarded as a '*person*' although juridically devoid of *persona*. When the slave committed a tort the master had either to make the damage good or to deliver the slave to the person harmed.

This surrender of the slave in reparation of damage done by him was called the *noxal* surrender (*noxæ deditio*).

Condition *de facto.*

The condition *de facto* of the slaves may conveniently be treated under two heads (i) condition under the Republic (ii) condition under the Empire.

(i) Republican period.

Although *de jure* the slave was not better than a mere chattel, *de facto* he was not very badly off in the Republican period. In fact during the earlier period he was regarded as a member of the family. He worked with the master in the field and had his meals with the master. This community of work and life raised him above the position of a mere servant. Moreecver the custom of the period tended to better his position by allowing him the *peculium* (small property). Peculium was a part of the master's property the administration of which was left to the slave. As the slave was without '*caput*' (head or personality) he could not become the 'owner' of the peculium but the custody of it was allowed him by custom. Often the *peculium* produced a definite money income which the slave was allowed to retain. Frequently the slave bought his freedom

with the accumulated interest of the *peculium*. Sometimes the master gave him the whole of the *peculium*.

(ii) Imperial period.

During the Imperial period the condition *de facto* of the slaves grew worse while the condition *de jure* considerably improved. The slaves were treated, as was the custom now, like beasts of burden. Despite the spread of stoic philosophy that was undermining the legal basis of slavery, custom was harsh to the slaves. Legislation of the emperors tended, however, to better their condition.

Amelioration of the personal condition of slaves.

A series of laws were directed to the amelioration of the personal condition of slaves. *Lex Cornelia de sicariis* passed about 82 B. C. made it homicide to kill *another's* slave. About A. D. 61 *Lex Petronia* forbad the killing of slaves without judicial sanction. Claudius decided that the master who abandoned his slaves, when they were ill, would lose his rights over them. Under Antoninus Pius a man who killed his *own* slaves was considered guilty of homicide. By various other constitutions of the emperors the condition *de jure* of the slaves was considerably improved.

Termination of slavery.

A slave did not necessarily remain a slave all his life. He might get his freedom in various ways. Sometimes he became free without the consent of his master, but generally by the transaction called the *manumission* (giving of liberty) which was either formal or informal. The chief formal manumissions were the following :—

1. Manumission by the rod (*Vindicta*).
2. Manumission by the sensus (*census*).
3. Manumission by the will (*testamento*).
4. Manumission in the sacred churches (*in eccleiis*).

Manumissio vindicta.

Manumissio vindicta was effected by a fictitious law-suit known as the *causa liberalis.* The slave was taken by the master to a law-court where a third party called the *adsertor libertatis* declared before the praetor that the slave belonged to no body and was really freeman. The owner did not object and the magistrate pronounced the slave to the free thenceforward. The method was called the method of the rod because in the course of the fictitious law-suit the slave was touched with a rod.

When a slave's name appeared on the

Manumissio censu.

census roll of free men the slave was declared manumitted.

Manumisio tetamento.

It was within the competence of every *Roman owner* of slaves to confer freedom on them either by way of a legacy or by directing his heirs that they should set at liberty a certain number of slaves at that time of accepting the *hereditas* (inheritance). In the former case the manumitted slave was called a freed man of Orcus (the god of the grave).

Manumissio in Sacro Sanctis ecclesiis.

During the time of the Christian emperors slaves could be manumitted in the churches in presence of the congregation. (According to some jurists this method of manumission is informal.)

Informal Manumissions.

The chief instances of informal manumission are three:—(1) by letter, (2) among friends, (3) at a funeral.

Manumission by letter (*per epistolam*). This was when a master wrote to a slave that he wished to confer freedom on him. The letter was regarded as sufficient evidence of the master's intention to manumit the slave.

Manumission among friends (*inter amicos*). When a master declared before his friends that

he wanted to manumit a certain slave, that slave was considered manumitted.

Manumission at a funeral (*pileo*). If a slave followed the burial procession of his master, according to the terms of his will, wearing the cap of liberty he was considered manumitted. (The cap was called *pileus*, hence the name *manumissio pileo*).

In the time of Justinian slaves could be set at liberty by their masters at any time they liked, for example, when a magistrate was passing along a street or when a prætor was going to the bath or when a magistrate was on his way to a theatre, a slave could be taken before him and declared free then and there.

Formal and informal manumission.

In order that the formal methods of manumission might apply it was essential that the master should have legal as opposed to equitable property in the slaves. In this connection it must be noted that when a slave was informally manumitted his freedom was recognised only by the prætor, so he was said not to be fully liberated but only conditionally free (*stàtu liberus*). The formally manumitted slaves were called the *libertini*. They occupied the position of freed men in civil law.

Manumission independent of the will of the master.

Sometimes manumission was effected by special laws. The manumission was then said to be independent of the will of the master. As instances of special laws may be quoted the *jus postliminni* and the *Edictum Claudianum* already mentioned.

Laws affecting the manumitted slaves.

Three specific laws affecting the condition of the freed (*libertini*) must be mentioned. These are (1) *Lex Junia Norbana;* (2) *Lex Fufia Caninia*; (3) *Lex Aelia Sentia.*

Lex Junia Norbana.

This is a lex of uncertain date. It laid down that the informally manumitted slaves should be regarded as Latins and not freed citizens of Rome. Since they were known as Latins in virtue of this Junian law they came to be called the Junian Latins.

Lex Fufia Caninia.

This laid down that no testator should be allowed to set at liberty more than hundred slaves. If the number mentioned in a will exceeded one hundred then those only would be manumitted whose names were recorded first upto and including the hundredth. If the names were written in a circle no one would be manumitted.

Lex Aelia Sentia.

This laid down that when a slave was less than 30 years of age or the master less than 20 years of age, the slave could not be manumitted except when there was sufficient reason *(justa causa)* approved by a council and the manumission was by the rod *(vindicta)*. This law also forbade manumission in fraud of creditors. All the slaves manumitted before they were 30 years old became *Junian Latins*; and a slave who during his servitude had been subjected to any severe punishment became a *dedititius*. [A *dedititius* could be re-enslaved if he lived within a radius of 100 miles from Rome.]

Condition of the freed man.

The various classes of freed men at the begining of the Empire were (1) the Dedititii;—(2) the Junian Latins;—(3) the Libertini.

The dedititii

They could not safely reside in Rome nor could they attain citizenship. They had no power of making a will or taking under a will.

The Junian Latins.

These were free men so long as they lived, but on their death their property passed to their original master or his descendants. That is why

Justinian says—"A junian Latin lost his freedom with his last breath." A Junian Latin, however, might acquire citizenship.

Libertini.

The Livertini in the generic sense of the word were the freed men who occupied a position nearly similar to that of the free born (*ingenuus*); only they could not wear the gold ring which was the mark of a free-born citizen. They suffered from certain incapacities, *e.g.* they could not become magistrates that is to say they had not the *Jus honorum*; they could vote in the legislative assemblies but their vote had not the same weight as that of a free-born citizen.

Acquisition of citizenship by a Junian Latin.

A junian Latin might become a citizen in one or other of the following ways:—

(I) *Iteratione* (by repetition). If Latinity had resulted from one of the informal modes of manumission the Latin by going through, *de novo*, a formal process of manumission could become a Roman citizen. (2) *Causae probatione* (by means of the proof of a sufficient reason). A *Causae probatio* was a favour granted to a Latin who married either a Latin or a Roman before seven witnesses and had a son as a result of the union. When the son had attained his

first year the parents were declared Roman citizens. Thus the *causae probatio* was granted only to the fruitful, (3) *Erroris causae probatione.* If there was a mistake in case of the *causae probatio e. g.* when a Latin married a peregrin (foreigner) mistaking the latter for a Latin, on proof of the mistake *causae probatio* was granted.

There were various other methods by which a Latin could become a citizen *e. g.* a Latin who was elected a member of the Night Guards, a Latin who established a bakery at Rome, a Latin who built a fine building at Rome, etc.

Coloni.

During the Imperial times a class of men known as the *coloni* appeared. They were in the eye of the law free, but inseparably attached to the soil (*glebae adscripti*). They could not leave the soil without the consent of their lords and when the owner of the soil sold it to another the *coloni* attached to the soil also passed alone with it to the new owner. [Compare the serfs or villeins of the Middle Ages.]

Justinian put all the freed men in the class

Justinian's legislation modifying the condition of the freed.

of *libertini* thus doing away with the distinction betwen the different classes of freed men. He repealed the *lex Fufia Coninia* and modified the *lex Aelia Sentia* by allowing manumission of slaves under 30 years of age. Masters less than 20 years old could under Justinian manumit slaves by a will. Whenever an intention to grant liberty was manifest Justinian allowed manumission *e.g.* when a slave was instituted an heir, the slave became a freed man even though the manumission resulted in a loss to the master.

[It may be useful to put down in a tabular from the different classes of the people in Rome at different times :—

Pre-Justinianian time.	Post-Justinianian time.
1. Ingenui.	1. Existed.
2. Statuliberi.	2. Existed.
3. Clients.	3. Existed.
4. Coloni.	4. Existed.
5. Bona fide servientes (they were quasi-slaves.)	5. (Whether now existed is doubtful.)
6. Auctorati.	6. Non-existent.
7. Naxi.	7. Non-existent.
8. Persons in mancipio (These were children sold by the paterfamilias to a third person.)	8. Only one class remained.
9. Redempti (Ransomed captives who could not pay their ransom.)	9. Perhaps non-existent.
10. Slaves.	10. Existed].

Libertus and Patronus.

The freed man was called the *libertus* in relation to his former master who was called the *patronus* (patron). The libertus owed certain duties to the patronus— the duties were classed under the 3 heads of (1) *Obsequium*, (2) *Operæ*, (3) *Bona*.

Obsequium.

This was the respect due from the libertus to the patronus. The *libertus* could not sue his patron without the permission of the praetor. If his patron fell upon evil days the freed-man was bound to supply him with food and shelter.

Operæ.

The *libertus* was required to do light works for the patron. This duty was binding on the freed-man only under a moral sanction. The works he was required to do were collectively known as *Operæ Officiales* (formal works). If the patron wanted to exact heavy work from the freed man (*e.g.* industrial services called *Operae fabriles*) he had to make the slave take an oath before the pointiffs at the time of manumission. This solemn oath was called *jurata promissio liberti.*

The patron and his family had the right of

Bona.

succession to the inheritance of the *libertus* when the latter died intestate and childless. The property which accrued to the patron in these circumstances was known as the *Bona.* In this connection it may be noted that because a patron had this contingent right of succession he had to bear the burden of *tutela* (guardianship) in case the libertus died leaving a minor child. The maxim of the Roman Law being wherever there is the profit of succession there is also the burden of tutela (*ubi emolumentum successionis ibi onus tutelae).*

Second Division of the Law of Persons—Status Civitatis.

Status Civitatis.

From the point of view of citizenship people were divided into the Roman citizens and the *peregrini.* The peregrins were sub-divided into (1) the Latins (2) The Peregrins proper.

Sources of citizenship.

(1) Birth—An individual whose parents were free Roman citizens from the moment of conception to moment of his birth was a citizen. When the parents were of different conditions at the time of birth (*e.g.*, father a Roman citizen

mother of Latin) the child born of lawful marriage followed the condition of the father at the moment of conception. In every other case the child was a *peregrin*. (2) Acquisition of citizenship after birth—Citizenship was sometimes granted as a special favour, *e.g.*, if a peregrin informed against a peculating magistrate he was granted citizenship,) generally it was acquired by naturalisation. Naturalisation was granted by the comitia centuriata under the Republic and by the emperors afterwards. Full citizenship was conferred freely in earlier times when Rome had need of citizens. Under the Republic it was the general custom to grant citizenship without political rights. This sort of qualified citizenship was called *civitas sine suffragio* (citizenship without the right of voting).

After the social war of 89 B. C. full citizenship was granted to all the inhabitants of Italy by the lex Julia attributed to the father of Julius Cæsar. In 212 A. D. Caracalla granted full citizenship to all the inhabitants of the empire. [It is said that this concession was allowed for fiscal purposes. The citizens alone being subject to a tax of $\frac{1}{20}$th on the succession (*vicesima hereditatum*) citizenship was extended to

all in order that this death duty might be exacted from as great a number as possible.—Fernand Bernard].

Characteristics of citizenship.

A Roman was called a *quirite* and the law applicable to him was called *jus-quiritium*. The latter had two aspects—private and public. From the private *jus quiritium* were derived the privileges attached to the citizens regarded as members of civil society. From the public *jus quiritium* came the privileges attached to the citizens regarded as members of the body politic. In other words the first aspect of the Roman civil law was concerned with the rights, duties, capacities, and incapacities of a Roman in relation to the members of his family and fellow-citizens while the last was concerned with a Roman in relation to the constitution of the state and the administration of its affairs. A citizen was consequently a civil as well as a political unit.

The privileges based on the private *jus quiritium* may be classed under three heads :—(1) *jus connubii*—this was the right to contract a legally valid marriage called *justœ nuptiœ* and to enjoy all the legal advantages that flowed from the latter, *e.g.*, power (*potestas*) over wife and children. It was the *connubium*

that created the civil relationship known as *agnetion* with its legal advantages. (2) *jus commercii*—this was the right of entering into a formal contract whereby ownership might be transferred in accordance with the formalities of the *jus quiritium.* It gave the power to witness or to take part in any transaction by copper and scale (*per aes et libram*) (3) *testamentifactio activa et passiva* (*i.e.*, the right of making a will or taking under a will).—This right was an appendage of *jus commercii* when the will was made by copper and scale and it was a part of the public *jus quiritium* when the will was made before a specially convened assembly called the *comitia calata.* [According to some the private *jus quiritium* included also the right to ask for *legis actio* (*i.e.*, the right to have recourse to the ancient form of procedure in the courts of justice).]

The privileges based on the public *jus quiritium* were (1) *jus suffragii*, (*i.e.*, the right of voting), (2) *jus honorum* (*i.e.*, elegibility for the magistracy).

Loss of citizenship.

Citizenship was lost either involuntarily or voluntarily. It was lost involuntarily (i) by the loss of liberty, *e.g.*, a prisoner of war lost his citizenship,

(ii) by the interdiction of fire and water (*interdictio aqua et igni*). This interdiction derived its name from the formula used to express the fact of expatriation. Under the Empire the *interdictio* was replaced by deportation having the same effect, Citizenship was lost voluntarily by any act indicating deliberate renounciation, *e.g.*, by getting oneself enrolled as a member of a Latin colony.

Non-citizens.

Originally a non-citizen was either a *hostis* or a *peregrin.* A hostis was any stranger who for the time being was living in Rome, while a peregrin was a non-Roman subject of Rome who was governed by his national law. One was a peregrin by birth and sometimes in consequence of the *interdictio aqua et igni.*

Condition of the Peregrins.

The peregrins had neither civil nor political rights. They lived under the rules of their national law, and their legal relations with the Roman citizens were governed by the *jus gentium.* Their marriages were valid but were not regarded as *justæ nutiæ.*

The Latins.

The Latins formed an important class of non-citizens. Originally the name Latin denoted an inhabitant of

Latium and then it was applied to any member of the Latin league, finally it signified an inhabitant of Italy who was not a Roman citizen. The Latins had *commercium* but not *connubium* unless it was conceded by the state as a special favour. [Under the Empire the distinction between the various classes of non-citizens vanished.]

Capitis deminutio.

The question of caput (personality of head) entails the question of change in caput. In classical law caput was the status of a person. The status determined the juridical capacity of individuals, consequently any change in the status (or caput) affected the juridical capacity of the individual concerned. This change was spoken of as a diminution of caput, (*i.e.*, *capitis deminutio*). The caput (*i.e.*, personality) as already observed, was made up of the three elements of *libertas*, (liberty) *civitas* (citizenship) and *familia* (family). Any change in one of these elements brought about a *capitis deminutio* (remember that capitis deminutio does not necessarily mean a lessening of caput—it simply means a change in caput). *Capitis deminutiones* were of three kinds :—(1) *Capitis deminutio maxima.* When a person lost his liberty he suffered

the *capitis deminutio maxima.* In other words that change in personality which made the person a slave was called the greatest change because it deprived him of all the elements of caput, *i.e.*, *libertas*, *civitas*, and *familia.* (2) *Capitis deminutio media*—when a person remained free but lost his citizenship the *capitis deminutio media*, took place. Thus when a Roman became a member of the Latin league he suffered this intermediate change in caput. (3) *Capitis deminutio minima*—When a man *sui Juris* (under no one's power) became *alieni Juris*, (*i.e.*, subject to some body's power), he suffered the *capitis deminutio minima.*

Condition of the *capite minutus.*

In principle the *capite minutus i.e.*, the person who was undergone a change in caput) was a new man Gaius compares him with a man who was suffered civil death. But it must be remembered that the prætorian law modified the civil law regarding *capitis deminutio.* According to the jus civile a *capite minutes* was freed from the obligations he owed before the *capitis deminutio.* But the prætor gave action against the capite minutus for the benefit of his former creditors. From the time of this prætorian change the capite minutus

could not be regarded as civilly dead for all purposes.

Third Division of the Law of persons.—Status Familiae.

The Roman family had for its very basis the notion of *patria potestas.* The family consisted of individuals who were all under the power of the *pate familias* (head of the family). The individuals placed under him were (1) the slaves subject to his power, (2) the wife *in manu* (literally in the hand, the hand being a symbol of power). (3) children and other descendants under *patria potestas,* (4) persons in *mancipio*, (*i.e.*, those who were under quasi-servitude in the family, having been mancipated to the head of the family).

Status Familiae.

The paterfamilias was at the same time the legislator and the judge in the family. He had the power of life and death (*jus vitae necisque* over the members of the family during the classical times. Sir Henry Maine observes "the first and greatest landmark in the course of legal history is the doctrine of *patria potestas* as illustrated by the Roman family system. The Roman family about the

Patria Potestas.

time of the XII Tables was an *imperium in imperio* (a kingdom within a kingdom). It was governed by the paterfamilias; the wife, the children, the slaves, the farmhouse, the flocks and herds were in his hands." The paterfamilias determined who should belong to the family. He might decline to admit a child his wife bore to him.

Aspects of the family.

The Roman family illustrates the three aspects which families in primitive societies generally present, *viz.*, the religious, the political and the proprietary. The family was greatly concerned with the sacra (*religious rites*). The hearth was the altar for the private cult and the paterfamilias was the priest. The family had a political aspect. It framed its own rules of government. The paterfamilias was, in a sense, the legislative and the constitutional head of the family. He was the supreme person in the family as the king was the supreme person in the state. Finally every person and every thing in the family belonged to the paterfamilias. He was the proprietor of the *familia* in its original sense (*familia*) denoted all that was necessary for agricultural pursuits *e.g.*, the plough, the oxen, the slaves, &c.

Patriarchal family and ancestral worship.

The patriarchal family in ancient Rome rested upon ancestral worship as in ancient Greece and in ancient India. The tie that united the members of the family was the *sacra*. The ancient Romans regarded the family as the instrument for keeping up the peculiar rites upon the due observance of which depended the happiness of the dead. To neglect them was to commit an abominable cruelty to the ancestor and to bring down a curse on his house. Upon the due performance of the *saera* by his son his own future happiness would depend. The extinction of the family was a thing to be regarded with horror. [Here we find a parallelism between the Hindu and the Roman societies. Thus in the well-known case of Radhamohan *v.* Hardai Bibi it was urged against the adoption of an only son that "it is abominable for a father to give his only son to another, for as a consequence of the extinction of family and the cessation of family rites the father himself after his death will be left in *put* (*i.e.*, hell). It might be replied that this was his own affair and affected nobody else. But it is not so, it affects his ancestors. If the rites had been duly performed by his son

—and his action makes it impossible—he would be free from *put*, his father would become immortal and his grand-father would be raised to the solar system." All this except the particular about the solar system would have sounded reasonable to a Roman in the early days of the city. (Walton.) In this connexion it may be useful to remember that not only the family but also the family property was regarded in ancient Rome, just as in ancient India, as destined for spiritual use. Maine observes "it sounds like a jest to say that according to the principles of Hindu Law property is regarded as the means of paying the funeral expenses of a dead ancestor. But this is not at all untrue of the written law in India as it was not untrue of the Roman law at its earliest stage."]

Agnation.

The bond that united the members of a family through *patria potestas* was called agnation. In fact during the Regal period relationship on the father's side alone was juridically recognised. If a mother was regarded as related to her children this was only so because she had altogether given up her own family and had passed into the family of her husband. The wife was thus looked upon as a daughter of her husband.

"A paternal uncle was a near relation, a maternal uncle was a stranger. Such was the theory of civil relationship called agnation." (Walton and Karlowa.)

Who are agnates?

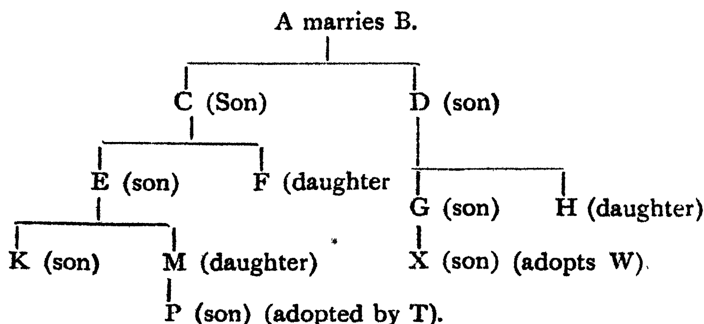
In the Institutes of Justinian we read agnates are those cognates who are related through males, *i.e.*, are cognates by the father. But this definition of agnates is faulty, because one may be an agnate without being a cognate and a cognate without being an agnate. For cognation simply means blood-relationship, while agnation is civil relationship determined by law. All persons related to a male or a female by male descent natural or fictitious are his or her agnates unless the tie of relationship has been broken by *capitis diminutio.* In other words as Sir Henry Maine has put it "agnates are those persons who are under the same *patria potestas* or would have been under the same *patria potestas* had the original ancester been alive."

Cognation.

Cognation as already explained means blood-relationship. Cognates are those relations who trace their common descent through the same pair of married persons, or as May has put it "cognation is the bond that unites on the one hand

the children with their ascendants of both sexes and on the other hand those descendants male or female that trace their descent through a common ancestor, *e.g.*, your sister's son is your cognate."

To illustrate the difference between cognation and agnation the following geneological table may be taken :—



Here E and G are agnates, E and W are agnates because in the first case they are under the same patria potestas by birth (natural descent) and in the second case by adoption (fictitious descent). K and P are cognates supposing that M has been married out of the family, E, F and H are agnates because F and H are unmarried. F and M are cognates and not agnates because M has been married out of the family.]

Gentiles.

If agnates are all persons related by a descent real or fictitious from a common male ancestor and gentiles are those bearing the same family name what is the difference between the agnates and the gentiles? That a difference existed between these two classes is proved by a famous section of the XII Tables where it is laid down that the order of succession on a man dying intestate should be as follows :—(1) the succession is to go to his *sui heredes*, (2) failing the *sui heredes* the agnates would come in, (3) failing the agnates the *gentiles* would succeed. Hence it is clear that the *gentiles* were distinguished from the agnates. At what degree of relationship shall we say the class of agnates is to close and the class of gentiles is to open? The general description of the gentiles as the class of persons bearing the same name and claiming common descent in the male line does not furnish an answer to the question. In fact the assimilation of the gentiles to the "clansmen" of modern times renders the distinction less clear. No satisfactory answer has, however, been suggested by the authorities. According to Mommsen any one who has able to *prove* his relationship in the male line with the deceased

could claim as an agnate. Failing any such person the estate went to the clan to which the dead man belonged. Agnation and gentility were then the same thing. All agnates were gentiles and all gentiles were agnates, but many of the gentiles were so far removed in blood from the dead man that relationship was impossible to trace. The common name and the common religious rites showed that it must have existed. But the tie was so distant that it was impossible to prove it. For purpose of succession a line had to be drawn. If a gentile could prove his relationship he was preferred to the gentiles who could not prove. He was an agnate in a narrower sense. According to others a line was drawn at a fixed degree of relationship. Agnates were all relations on the father's side up to and including the sixth degree, the rest were gentiles. This theory is supported by an analogy from Hindu law where a similar line is drawn between a *sapinda* and a *samanodaka.*

Position of women.

It is significant that unlike *patria potestas*, *matria potestas* plays no part in Roman law. In fact the woman in early law was in perpetual tutelage and being under control herself was not allowed to

control others. While unmarried she was under the power of her father, on marriage she passed into the *manus* (control) of her husband and when a widow she was under the agnatic guardianship of her sons (or other agnates.) She was sometimes said to be the head and the tail of her own family (*mulier et caput et finis suœ familiœ est*) implying that if she married she passed into another family, otherwise she remained in the fàmily of her origin.

[*cf* :—पिता रक्षति कौमारे भर्त्ता रक्षति यौवने ।
रक्षन्ति स्थविरे पुत्रा न स्त्री स्वातन्त्र्यमर्हति ॥

The father guards them in childhood, the husband guards them in youth, in old age the sons guard them. A woman ought not to be in a state of independence—*Manu.*]

Paternal power.

Paternal power (*patria potestas* was exercised by the head of the family over his descendants of this first, second and all other degrees. The expression *patria potestas* had thus a juridical sense different from its literal meaning. So long as the grandfather was alive he alone was the head of the family, his sons and grandsons of whatever age were under his power (*i.e.*, were *alieni juris.*) The mother, as already observed, had no *potestas*

over the children.—She was under the power of her husband (or husband's father or grandfather) so long as he was alive, on his death she passed into the power of her own children who were her agnates.—The patria potestas was exercised with reference (i) to the person of the *filius familias* (son of the family), (ii) to the property of the *filius familias*.

In early times the head of the family had the power of life and death over his children (*jus vitæ necisque*). He could sell them or surrender them to a party against whom they had committed a tort. (This surrender in *mancipio* on account of delict was called *noxae deditio*). The absolute power of the head of the family over the person of the *filius familias* continued down to the end of the Republic. Afterwards the extent of this power was considerably limited through the legislations of the emperor, *e.g.*, Hadrian punished with deportation a father who had killed his son. Alexander Severus limited the right of the father to simple correction. The right to sell the children existed even in the time of Constantine who, however, allowed only the newly-born infants (*sanguinolentes*) to be sold when parents were in extreme misery. The noxal

Person of *filius familias*.

surrender of children was abolished by Justinian.

In early law the filius familias could not own any separate property; all that he acquired went to the head of the family. Consequently the son under power could not make a will. The father was not responsible for the contracts of the son. In general it may be said that the son had no proprietorial rights and correlatively no proprietorial obligations. This state of affairs was, however, modified during the Imperial regime. Frequently the son was allowed to administer a portion of paternal property. The particular fund, the administration of which was left to the son, was called the *peculium* (small property). It was called *peculium profectitium* if it came directly from the father or from any other paternal ancestor. *Peculium profectitium*, although legally the property of the father, was generally allowed to be taken away by the son on emancipation. Under Augustus all that the *filius familias* acquired in military service belonged to him and was called the *peculium castrense*. Under Constantine the son was entitled to all that he acquired by discharging civil functions or in offices of

Property of filius familias.

the court. The property so acquired was known as the *peculium quasi-castrense.* All property inherited from the mother or coming from strangers and not falling under *castrense* or *quasi-castrense* was called the *peculium adventitium* or *bona adventitia.* Under Justinian so long as the father had patria potestas he enjoyed a life-interest in the produce of *peculium adventitium* and on emancipation he retained the usufruct (use and enjoyment) of half the property.

Limit of *patria potestas.*

Patria potestas was, however, confined to the limits of the family. It had nothing to do with the public life. Thus the *filius familias* might become a magistrate and as such might punish the paterfamilias for any breach of law.

Sources of patria potestas.

The principal sources of patria potestas were (1) *justae nuptiae* or *matrimonium,* (2) adoption or arrogation, (3) legitimation.

Justae nuptiae.

Justae nuptiae or *matrimonium* (marriage) is defined by Justinian as the lawful union of men and women whereby they consent to lead an undivided life. In the words of Modestinus "marriage is the union of a man and a woman

leading to the sharing of rights, divine and human, throughout their lives." A mere union of a male and a female was called *stuprum* which was not regarded as a source of patria potestas. Marriage was of two kinds both recognised as legitimate. In one case it was called marriage with *manus* when the wife passed into the family of the husband. In the other case it was called marriage without *manus* when the wife remained in the family of her father, and her agnatic relationship with the members of her family of origin remained intact.

Marriage and manus.

Manus, although it arose out of marriage, was exercised not only by the husband, but also by the head of the family. It was a manifestation of the power of the paterfamilias in a different sphere. Sometimes a mutual agreement to marry called *sponsalia* preceded marriage. Manus was not produced by this sponsalia; because sponsalia was only a preliminary step which might or might not lead to marriage proper. According to some jurists marriage unless it was coupled with *deductio in domum mariti* (leading into the house of the husband) did not necessarily produce *manus*. [It may

be remarked that in the last view marriage was a real contract completed by delivery (*traditio*).]

Acquisition of *manus*.

Manus was acquired in ancient law by one or other of the following modes of marriage :—(i) *confarreatio*, (ii) *coemptio*, (iii) *usus*.

Confarreatio.

"Confarreatio had for essential elements" says Girard "the offering to Jupiter of a wheaten cake and the pronouncing of sacramental words before ten witnesses, the *pontifex maximus*, and the priest of Jupiter." It was a truly religious marriage which was a survival from archaic times, *e.g.*, the wheaten cake was connected with a phase of family cult where the feeding of the members was a leading phenomenon; the ten witnesses represented perhaps the ten curies into which each of the ethnic tribes was divided. The confarreate form of marriage was inaccessible to the plebeians. In the time of Gaius this form had very nearly fallen into disuse, although he mentions that the functions of the higher priests could be performed only by persons born of confarreate marriage.

Co-emptio.

Co-emptio has often been called a civil marriage existing side by side with the religious marriage—the

plebeian marriage existing along with the patrician marriage. The wife was acquired in this form of marriage as a slave or any other moveable was acquired by mancipatio. Thus it was a transaction *per aes et liberam*. Gaius says that certain words of form were pronounced by the husband as well as by the wife.

Usus.

Usus, to quote Girard, " is to the co-emptio what *usucapio* is to *mancipatio*." If there had been no co-emptio or only a defective co-emptio manus could still be acquired through efflux of time, *i.e.*, acquisition of manus by prolonged possession was allowed just as acquisition of property by prolonged possession. If the wife remained for one complete year in the house of the husband, the husband acquired manus by a sort of positive prescription. But if she absented herself for three nights in succession the discontinuity in the possession was called *usurpatio trinoctii* and manus could not be acquired in such a case.

Essential conditions of marriage.

The forms of marriage, although necessary for acquisition of manus, were only the accidental part of it. The essential conditions were three in number, (i) puberty, (ii) consent, (iii) connubium.

Puberty.

In early Roman law puberty was question of fact and was determined in every case by the physical condition of the parties. Later on puberty was determined by the rule that males of 14 years of age and females of 12 years of age were quite competent to enter into marital relationship.

Consent

The consents indispensable for marriage were (i) the consent of the parties to be married, (ii) the consent of their respective family heads, (iii) if one of them was a grand-child, then in the case of a male grand-child, the consent of the father as well as that of the grand-father while in the case of a female grand-child the consent of the grand-father alone. In early Roman law if the heads of the families did not consent to a proposed union the marriage could not take place, but later on when the parties were willing they could constrain their parents to give their assent. Thus it has been remarked "what was at first a marriage completed by the consent of the parents became later on a marriage completed by the consent of the parties with the authorisation of their parents." (Girard).

Connubium was the capacity to contract le-

Connubium.

gally valid marriage (*justae nuptiae*). Marrige might be disallowed for want of either absolute or relative connubium. Slaves and the peregrins without *jus connubii* lacked absolute connubium. Relative connubium was determined either by political consideration or by agnation, cognation, and affinity.

Prohibition on account of political necessity.

For political reasons marriage was disallowed in early law between the patricians and the plebeians, between senators or his descendants and the daughter of an actor or an artisan. Till the statutory modification of the customary law relative connubium was absent in these cases.

Prohibition through relationship.

Sometimes lawful marriage could not take place on account of relationship, natural or artificial, between the parties, *e.g.*, those in the direct line of descent from a common ancestor could not contract *justae nuptiae* among themselves. Persons in *loco parentis* could not enter into marriage with those in *loco filii*. The general rule in such cases was that the ascendants and the descendants to the most remote degrees could not marry and this prohibition applied to the fictitious relationship established by adoption. In the case of collaterals marriage

was prohibited as between brothers and sisters either natural or fictitious or between nephew and niece, although exceptions were made by special laws in favour of emperors, *e.g.*, Claudius married his niece Agrippina in virtue of a special law. The substance of the rule regarding prohibition on account of relationship may be thus expressed: In direct line prohibition *ad infinitum*; in collateral lines prohibition extended upto the third degree, *e.g.*, uncle and niece, nephew and aunt, etc. In case of those related by agnation, marriage was prohibited between the adoptor and the descendants of the adoptee as well as between the children adoptive or natural of the person who had been adopted. In the case of affinity, (*i.e.*, relationship between one of the spouses and the members of the family of the other spouse) the rule under the Republic was that in direct line the prohibition continued *ad infinitum* but in the collateral line only up to the sister of the deceased wife or the widow of the deceased brother.

Prohibition on account of certain laws.

Besides the general rule determining the presence or absence of connubium certain special laws were passed from time to time disallowing *justae nuptiae* in specified cases, *e.g.*,

by a special law marriage was not allowed between the governor of a country and the members of the community under his charge.

Effect of marriage.

The effect of marriage varied according as the marriage was with manus or without manus. In the case of marriage with manus (*cum manu*) there was *conventio in manum* (passing into the power of the husband). As between the spouses the relationship of father and daughter was established. The connection of the wife with the members of her own family ceased and could not be replaced even after the dissolution of marriage. An agnatic bond united the wife with the family of her husband. The husband or the head of the family, when the husband was *alieni juris* (subject to patria potestas), had complete dominion over the person and the property of the wife. All the proprietorial right of the wife were merged into those of her husband but she acquired the important right to inherit the property of her husband or of the head of the family—the former because she was in *loco filiae*, the latter because she was in *loco neptis*. When the marriage was without manus (*sine manu*) there was no *conventio in manum* and therefore the wife remained under

the power of the head of her paternal family. Her agnatic relationship remained unchanged although for the purposes of raising legitimate children she was considered to have passed into the family of her husband.

As regard the property, when the marriage was with manus the husband or the head of the family acquired, as we have already seen, the whole of the property of the wife; when the marriage was without manus the wife retained her rights with reference to her own property.

Relation between the children and the mother.

When the marriage was with manus the wife was in the position of a sister to her own children (in *loco sororis*, and the rule as to succession was the same as that obtaining in the case of succession between brothers and sisters. If the wife was not *in manu* she and her children did not belong to the same family and therefore there was no right of succession as between herself and her own children before the law as modified by two *Sonatus Consulta*, *viz.*, *S. C. Tertullianum* and *S. C. Orphitianum*. [As regards the father, it may be noted in passing that the children were always

under his power whether the marriage was with manus or without manus. In other words manus had nothing to do with patria potestas and consequently the children had the right of succession, in all cases, as the heirs of their father.]

Dissolution of marriage.

Dissolution of marriage was either involuntary or voluntary. It was involuntary in the following cases: (1) death of one of the parties (2) captivity of one of them. If a husband returned from captivity he could claim his former wife without going through the ceremony of marriage *de novo*, supposing that the wife had not married during the time that the husband was a captive. In the time of Justinian she was compelled to wait for five years before she could contract a second marriage. (3) *Capitis deminutio media*, *i.e.*, loss of citizenship, since the loss of citizenship reduced a Roman citizen into a peregrin and between a peregrin and a Roman there was no *connubium* the marriage was dissolved. (4) In the case of marriage without manus *capitis deminutio minima* sometimes effected a dissolution of marriage, *e.g.*, if a father-in-law adopted his son-in-law; but if the marriage was with *manus* as the woman

Essential conditions of adoption.

—(1) The adoptor should have attained full puberty and should have been at least 18 years older than the adoptee. It has been doubted, however, whether this rule was always followed in Roman law, at least the question was disputed in the time of *Gaius.* (2) Adoption imitated nature as far as possible; so eunuchs were not allowed to adopt although the *spadones* (impotent persons) were allowed to adopt. (3) Adoption, strictly so called, did not apply to adoption by women. In fact before Diocletain women were not allowed to adopt at all and afterwards, when they lost their own children they were allowed to adopt but they never acquired *potestas* over the adoptee.

Arrogation.

Adoption, as has already been remarked, was the process of bringing a person *allieni juris* from one family into the *agnatic* relationship with another family; while *arrogation* denoted the process of reducing a person *sui juris* into a person *alieni juris e.g.*, when the head of a family was adopted the process strictly speaking was *arrogation* and not adoption. On account of the importance of *arrogation*, since it destroyed a family, *arrogation* in early law took place

before the people assembled in a meeting where pontiffs were present and votes of the people were taken. The assembly specially convened for the purpose was called the *comitia calata.* In this *comitia* originally the whole populace assembled, but later on they were represented by 30 *lictors.* In order that the *arrogatus* (the person arrogated) might not suffer through unjust emancipation, a promise was made by the *arrogator* that in case of emancipation without a just cause the *arrogatus* would get back all his property. In the Imperial times *arrogation* was often effected by a rescript from the Emperor. In this case no preliminary enquiry nor any meeting of the people was necessary. According to some commentators sometimes *arrogation* took place in consequence of a testament directing it. Such an *arrogation* has been called, although improperly, *arrogation* by will.

Effect of arrogation.

• The effect of arrogation is generally considered with reference to (1) the person of the arrogatus; (2) the property of the arrogatus. As regards the person, the arrogatus passed under the power of the arrogator and children of the arrogatus, if any, together with their father

became subject to the power of life and death (*jus vitae necisque*) of the head of the family. As a compensation for the loss of his rights the *arrogatus* acquired the rights of succeeding of the property of the arrogator on letter's death.

Property of the arrogants.

In *jus civile* the property of the arrogatu's in consequence of *capitis deminutio minima* became merged into the property of the arrogator. Therefore if after arrogation emancipation took place for sufficient reason the arrogatus did not get back his own property. Moreover the debts due to the arrogatus passed to the arrogator who could sue for the debts but the debts due by the arrogatus ceased to exist after arrogation. The prætor, however, modified this rule, at first by an action called *actio de peculio* whereby the creditors of the arrogatus could satisfy themselves out of the property of the arrogatus; and later on by a *restitutio in integrum* the result of which was that the arrogatus was supposed, for the benefit of the creditor, not to have undergone a *capitis deminutio minima* and consequently the creditors could sue him as if he were *sui juris*.

In the process of adoption *strictly* so called

Adoption.

two steps were necessary, one for the extinction of the existing *patria potestas* and the other for the creation of a new agnatic relationship. In old law these two elements consisted of a triple sale and a *cessio in jure.*

Process of adoption.

A famous section of the XII Tables says—"If the father sells his son for three times the son shall be free from the power of the father." (See Introduction). This principle was utilised for severing the existing agnatic relationship. The *filius familias* was sold to a nominal purchaser. After the sale the son was said to be emancipated (sold out of the family). The purchaser re-sold (remancipated) the son to the father. The sale by the father was thus followed by a resale by the purchaser. According to the XII Tables the son had to be sold thrice. So there were three sales (mancipations) and two re-sales (remancipations). After the third sale the paternal power was extinguished but the son did not forthwith fall under the power of his adoptive father. For establishing the new potestas a fictitious law-suit called a *cessio in jure* was necessary. The adoptive father declared before a magistrate that the

adoptee was his own son, the natural father did not object, a judgment was entered against the natural father and the son fell under the power of the adoptive father. [One mancipation extinguished the *potestas* over a daughter or a grand-child.]

The effects of adoption may be considered under three heads:—(1) The person of the adoptee.—the adoptee alone fell under the potestas of the adoptive father. His children, if any, remained in the old family. One could be adopted as a child or as a grand-child, in the latter case the consent of the son to whom an adoptee was given as a son was necessary. Public honours were not affected by adoption, *e.g.*, a senator adopted by a plebeian remained a senator. (2) The name of the adoptee.—The adoptee added to his own name that of his adoptor transformed into an adjective, *e.g.*, Scipio adopted by Octavius became Scipio Octavianus. (3) Successional rights of the adoptee.—The adoptee as a *suus heres* of the adoptor was entitled to all the successional rights of a child of the family but he lost all rights as to his old family. Justinian, however, modified the law on this point. He made a distinction between adoption by a

Effects of adoption.

stranger and adoption by a maternal ascendant. In the former case the adoption was called *minus plena,* the adoptee remained under the potestas of his natural father; the adoption gave him the right to succeed to the property of his adoptive father in addition to all the rights he had with reference to his original family. In the latter case, *i.e.,* in the case of adoption by a maternal ascendant, it was termed *plena* and the child passed into the potestas of his adoptive father, the old, patria potestas being extinguished.

Legitimation.

Justinian says—"It sometimes happens that children who at their birth were not in the power of their father, are bought under it afterwards." (I. 10 13.) In other words by legitimation offspring born out of wed-lock were placed in the position of legitimate children and consequently fell under the potestas of their father. Legitimation was therefore a source of patria potestas.

Natural issue and *patria potestas.*

In Rome children born out of wed-lock fell under two categories:—(i) issue of concubinage *(liberi naturales),* (ii) bastards, *spurii,* issue of accidental union of male and female. These

natural children were not agnatically connected with their fathers. Thus the saying was that at Rome there were natural mothers but only legitimate fathers. Before the time of the Christian emperors the natural children had no right to succession *ab intestato* except in certain special cases, *e.g.*, natural sons of soldiers born during active service succeeded as cognates. Under the Christian emperors through the process of legitimation the *liberi naturales* (but not the *spurii*) were brought under *patria potestas*.

Legitimation was effected in three ways :—

Modes of legitimation.

(i) by the subsequent marriage of the parents ; (ii) by oblation to the *curia ;* (iii) by a rescript of the emperor.

Legitimation by subsequent marriage (*legitimatio per subsequens matrimonium*).—This method originated from a constitution of Constantine who established that natural children should be made legitimate by the subsequent marriage of their parents provided the mother was *ingenua* (free-born) and the father had no children of a lawful wife.

Legitimation by oblation to the *curia*

(legitimatio per oblationem curiae). In provincial towns magistrates were generally elected from the college of *decurions* called the *curia*. To be a member of the *curia* was a great but onerous distinction. A natural son who consented to become a *decurion* gained the right of succession as an heir of his reputed father. This mode, however, effected only partial legitimation because the son acquired no relationship to any other member of his father's family.

Legitimation by a rescript of the emperor *(legitimatio per rescriptum principis)*—sometimes legitimation was effected by the imperial rescript. Justinian enacted that when a marriage with a concubine was impossible the natural children in the absence of legitimate ones might be placed by a rescript in the position they would have occupied had the marriage taken place.

The causes putting an end to the paternal power fall into two classes:—

Extinction of *patria potestas.*

(1) Extinction of *patria potestas* without the dissolution of agnation, *e.g.*, by the death of the head of the family the children under his immediate *potestas* became *sui juris;* so by the *capitis deminutio*

maxima or *media* of the father the children were freed from *potestas*, again the elevation of the children to certain priestly dignities (*flamen* of *Jupiter*, *vestal virgin*) made them *sui juris*. In all these cases *agnatic* relationship was not affected.

(2) Extinction of *patria potestas* with the dissolution of agnation. The chief instances of this class are:—(*a*) The *capitis deminutio maxima*, *media*, or *minima* of the children. In the last case (*capitis deminutio minima*), however, one *potestas* was replaced by another and consequently there was a transfer and not extinction of *potestas*. (*b*) Emancipation. This was voluntary renunciation of *potestas* by the father and was rarely allowed in early law because the emancipated child suffered a loss being deprived of the right of agnatic succession. When allowed, emancipation was effected by triple sale—the first part of the ceremony of adoption being utilised. After the third sale the purchaser-friend emancipated the filius familias for the third time and thereby became his patron. The son was now free from *patria potestas*. Sometimes the father wanted to be the patron of his emancipated son. In such a case the purchaser-friend instead

of emancipating the son, for the third time remancipated him to the father who liberated the son and became his patron. Generally by a contract of *fiducia* the patronage was reserved for the father. Under Anastasius a child could be emancipated by a rescript of the emperor. In the time of Justinian the old ceremony was abolished and emancipation was effected either by a rescript or by a simple declaration of the father before a magistrate.

Effect of emancipation.

Emancipation completely cut off a child from the family. In old law the son after emancipation lost his successional rights and found himself, in general, without any property. But later on the emancipated son was allowed different kinds of *peculia*, *e.g.*, the *peculium castrense* and *quasi-castrense* were the absolute property of the son. Again the prætor called to succession the emancipated son along with the unemancipated children of an intestate. The father also succeeded to the property of the emancipated son if the latter died intestate and without issue, provided that the father was his patron.

Fourth Division of the Law of Persons— Guardianship.

Guardianship.

A person, although *sui juris* and in possession of every right, might be unable through some imperfection, to exercise the rights he possessed. Again a person might be *sui juris* and of an age to exercise his rights yet it might be necessary "to insure that he did not hurt himself and his family by the mode in which he exercised them." In Roman law tutors and curators were appointed in such cases. [According to Buckland *tutela* (guardianship) was originally designed for the protection of the property in the interest of the successors and in course of time became guardianship in the modern sense of the term.]

Tutors.

When a person was *sui juris* and less than 14 years old tutors were appointed to perform all the acts which the infant-minor (*impubis*) himself could not perform. Tutors were of four kinds :—

(a) Statutory tutors or tutors-at-law. These were sometimes called legitimate tutors. There were two classes of them, *viz.*, the agnates and the patrons. They derived their

authority from a section of the XII Tables which runs as follows :—" Where there is the profit of succession there lies also the burden of *tutela* " (see Introduction).

(*b*) Testamentary tutors, *i.e.*, tutors appointed by a will. The XII Tables conferred on the pater-familias the power of appointing tutors by a testament. The section runs as follows :—" As a man shall determine by his will regarding the *tutela* and his *pecunia* so shall be the law," (see Introduction).

(*c*) Tutors appointed by a magistrate. They were also called *dative* tutors. On the failure of a testamentary or a legitimate tutor guardians were sometimes appointed by the prætor at Rome or by the *praefectus urbi* in the case of pupils of high family. The *dative* tutors were sometimes called the *Atilian* or the *Julio-Titian* tutors because they derived their authority from the *lex Atilia* or the *lex Julia-Titia.*

(*d*) Fiduciary guardians.—The exact meaning of the expression *tutela fiduciaria* is hard to discover. Perhaps this class of guardianship was connected with the contract of *fiducia.* According to Justinian if a father died without appointing any guardian by a will, the *tutela*

of his minor sons would fall to those male children who were more than 25 years old. The brothers of the *impubis* would be called legitimate tutors because they were his agnates. In the case of an emancipated son who ceased to be an agnate the brothers would be called fiduciary tutors.

Functions of the tutor.

The tutor acted on behalf of his pupil, that is to say, he not only supplied the physical power but also the legal power for performing juristic acts. This power of administration was called *negotiorum gestio.* The tutor also interposed his authority *(auctoritas).* In other words when the pupil could understand the transaction but was not able to comprehend fully all the bearings of it, the tutor made himself solely responsible by authorising the act. The pupil could not bind himself without the *auctoritas* of the tutor. [In Roman law three periods of pupilage were recognised: (i) *Infantia* when the child was unable to speak. (ii) *Infantiae proxima, i.e.,* the neighbourhood of infancy. (iii) *Pubertati proxima, i.e.,* the neighbourhood of puberty. During the first two stages the tutor had to put in his authority (*auctoritas*) as well as perform all acts for him while in the

ast stage he had to interpose his authority alone.] The tutor had to take charge of the pupil's education and general upbringing. But the protection of the pupil's person was left either to his mother or to a maternal ancestor who would not succeed to the pupil on his death.

Obligations of the tutor.

The tutor could not under any form give away the property of the minor. He could not manumit the slaves of his ward. He could not alienate the immovables or valuable movables belonging to the pupil. If the tutor acted within the limits of his power (*e.g.*, if a movable belonging to the pupil had been sold on account of necessity), to the detriment of the ward the prætor might be asked to nullify the transaction, the nullification was called *restitutio in integrum.*)

Acts by the ward.

According to Justinian "the ward was capable of making his condition better but not worse, that is to say in transactions where an advantage was coupled with a detriment the transaction was valid in so far as it produced a gain but invalid in so far as it put an obligation on the minor." Again Ulpian says "should

the minor make a sale he certainly becomes creditor for the price but not debtor for the thing sold. Should he receive a payment of money, the money received in payment is certainly acquired by him but his claims are not extinguished, the tutor can recover *de novo* the whole amount." But the rule was modified in cases where the ward did not waste the money received in a transaction, *e.g.*, if the ward sold something and bettered his condition with the proceeds of the sale he could not claim a return of the thing sold without paying back the price he had received. But if the money had been squandered by him he could claim a return of the thing sold.

Actions against the tutor.

As general measures for the safety of a minor's property certain actions were allowed. The most important of these were:—(1) *Actiode rationibus distrahendis.* This was an action, in old law, against an unfaithful tutor who had converted his pupil's goods wrongfully. The tutor had to pay double the value of the things converted. This action aimed only at acts of unfaithfulness caused by a *bona fide* transaction carried out by an honest tutor. (2) *Crimen suspecti.* This action involved forfeiture

against a suspected guardian. It could be brought even by a woman who was related by blood to the ward. (3) *Actio directa tutelæ.* This was an action against the tutor for injuries to the property of the pupil. (4) *Satisdatio rem pupilli salvam fore,* (*i.e.*, security for the safety of the pupil and his property.) This security consisted in a promise of the guardian coupled with a guarantee by three men. (5) *Actio subsidiaria* (*i.e.*, a subsidiary action.)—This was an action against a magistrate whose duty it was to enquire into the solvency of a person who had been nominated for tutorship. This action was available not against the chief magistrate who would finally appoint the tutor but against the subordinate magistrate who was entrusted with the preliminary enquiry. (6) *Privilegium inter personales actiones* (*i.e.*, privilege in personal actions.) By virtue of this privilege the pupil had a priority over other unsecured creditors of the tutor. (7) Implied hypothec. From the time of Constantine there was an implied hypothec on the tutor's property.

Excuses for tutela.

The *tutela* was a burden imposed on Roman citizens. People were generally anxious not to have this burden put on them. Certain persons were

exempted from this liability on special grounds The principal excuses were the following :—(1) Three living children at Rome. (2) Three burdens of tutela at one and the same time. (3) Certain public functions. (4) Age, *e.g.*, if a man was more than 70 years old he was excused. (5) Certain physical defects, *e.g.*, blindness, deafness, etc.

Tutela mulierum.

The guardianship of women *tutela mulierum*) was, in early law, perpetual. Till the time of Diocletian a woman was throughout her life under a guardian. At the commencement of the empire, however, women could dispose of property (not being *res mancipi*) without the authorisation of a tutor. In the case of *res mancipi* such an authorisation was necessary. Certain other exceptional acts also required the authorisation of the tutor, but the tutor was compelled to give his *auctoritas* when required, only the tutors-at-law had a choice in this matter, *i.e.*, if they liked they might withdraw their authority. By the famous *lex Papia Poppoea* a free woman who had three children and a freed woman who had four children escaped the tutelage. This privilege was called the *Jus liberorum.* The guardianship of women

definitely disappeared when Theodosius and Honorius granted *jus liberorum* to all the women of the empire. *Lex Claudia* abolished the agnatic tutelage of women.

End of tutelage.

Tutela ended either (*a*) *ex parte minoris* (on the part of the minor) or (*b*) *ex parte tutoris* (on the part of the tutor.

Ex parte minoris.

(1) By the ward completing his fourteenth year. (2) By the death of the pupil. (3) By *capitis deminutio* of the pupil.

Ex parte tutoris.

(1) By *capitis deminutio* of the tutor. (2) By the death of the tutor. (3) By the conviction of the tutor for unfaithfulness. (4) By discharge. (5) By expiry of time if the tutor had been appointed for a fixed period.

Curators.

Besides the *impubes* (infant-minors) and women there were certain other persons who were deemed incapable of managing their own affairs. These were :—

(i) the adults under 25 years of age,

(ii) the spendthrift *prodigus*),

(iii) a mad man who had lucid intervals (*furiosus*).

(iv) a mad man who had no lucid intervals *mente captus*). A guardian called a

curator was appointed to watch over the interests of these people. Technically speaking a tutor was appointed to the person, and a curator to the property.

Appointment of a curator.

A curator might be appointed by a will, but the appointment had to be confirmed by a magistrate. If no curator was appionted by a will, the prætor or any other superior magistrate after considering the claims of the nearest relations appointed a curator. By the XII Tables the curatory of the insane and the incapable devolved on the nearest agnates. If no agnates were existing the magistrate appointed a curator just as in the case of an adolescent. Sometimes curators were appointed for special purposes by the judges, *e.g.*, a *curator ad litem* was appointed by a judge when a minor was involved in a law-suit.

Acts by the adolescent.

A minor *pubis* who was *sui juris* could perform the ordinary acts without the intervention of a curator, but in more important acts, *e.g.*, if a minor wanted to sell or burden his property with a charge the *concensus* of a curator was required. The *concensus* differed from the *anctoritas* of a tutor in the following ways :—

(1) It was divested of all formalities.

(2) It could be given before or after the event, while *auctoritas* had to be concomitant with the transaction authorised.

(3) The want of *consensus* did not nullify an act, but there was only a risk of a *restitutio in integrum*.

Obligations of the curator.

The obligations of a curator were generally the same as those of a tutor. The curator was allowed to perform all the acts that tended to better the condition of the minor. If loss accrued to the property of the minor through the negligence or carelessness of the curator he had to make it good. The obligations were enforced by civil as well as by prætorian actions.

End of *curatela*

When the adolescent attained his 25th year the *curatela* came to an end automatically. In some case even before that age the "caretakership" (*curatela*) could be terminated by the state on proof of sufficient reason. This was called *venia aetatis*, *i.e.*, dispensation granted because there was a supposition that the 25th year had been virtually reached although not really. In the case of the *mente captus* the *curatela* lasted throughout his life.

CHAPTER III.

LAW OF THINGS.

Law of things.

Persons are subjects of rights while things are objects of rights. A thing, juridically speaking, is not necessarily a physical object. Just as a person is a "right-and-duty-bearing" entity so a thing is a "right-and-duty-centering" entity. Thus all things are objects of rights, but all objects are not things. Gaius and Justinian classify the things in accordance with the rights which exist over them, "the distinctions turning on the questions, how far and by what manner of owner they are owned."

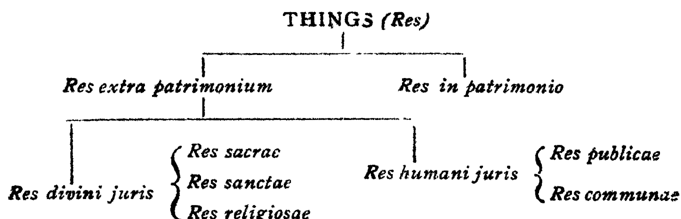
Divisions of things.

The chief classifications of things are the following :—

Classification I { 1. *Re extra patrimonium.* 2. *Res in patrimonio.* }

Res extra patrimonium were the things which could not be owned by any private individuals although their use was common to all. *Res in patrimonio*, on the other hand, were the things which could be owned by private individuals or corporations. *Res extra patrimonium* were sub-divided into the *res*

divini juris and the *res humani juris.* The *res divini juris* were further classified into the *res sacrae, res religiosae,* and *res sanctae* ; while the *res humani juris* were sub-divided into the *res communae* and the *res publicae.* [This scheme of division and sub-division may be put in a tabular form as shown here :—



Res sacrae were things consecrated to the gods above, *e.g.*, a temple. *Res religiosae* were things consecrated to the gods below, *e.g.*, a tomb. *Res sanctae* were things protected originally by a religious sanction, *e.g.*, walls and gates of the city. *Res communae* were the things whose use was common to all, *e.g.*, air, sea-water, etc. *Res publicae* were the things that formed a part of the public domain of the state or the city, *e.g.*, town-halls, theatres, baths, etc.

Classification II { 1. *Res mancipi.* 2. *Res nec-mancipi.*

Mancipium according to girard was the Roman ownership exercised over a Roman

things for the profit of a Roman citizen. *Res mancipi* included the Italian soil, the slaves, beasts of burden and animals which herd together and rural servitudes pertaining to the Italian soil (*e.g.*, the right of passage through an adjoining land). All the other things were *resnec-mancipi*. The main characteristic of a *res mancipi* was that it could be conveyed only by *mancipatio* which was a *quiritary* sale *per aes et libram* in presence of five grown up citizens and a balance-holder called the *libripens*. According to Cup the *res mancipi* were the things called by the Romans *familia* while the *res nec-mancipi* were what the Romans called *pecunia*.

Classification III { 1. *Res corporales.*
2. *Res incorporales.*

Res corporales are the things having a physical existence. They can be touched (*quae tangi possunt*). The *res incorporales* have only a national existence, in other words these exist in the eye of the law although not physically (*quae in jure consistunt*).

Classification IV { 1. *Res mobiles*
2. *Res immobiles.*

These correspond to the modern division of things into movable and immovable.

The division of objects of ownership into

Real rights and personal rights.

corporeal and incorporeal is not of so much importance as the subdivision of the corresponding rights into real rights and personal rights. Property itself is a real right but to prevent the confusion between property and ownership—one an object of a right, the other itself a right—the term real right is used to denote special types of rights. All rights over the things of another are real rights *(Jura in re aliena).* Thus the owner of land may use it in any way he likes while the owner of a real right over land can use it only in a specified way, *e.g.*, the servitude of passage allows him only to pass through the adjoining land. In contradistinction to real rights personal rights are generally termed obligations. A personal right is a credit looked at from the active point of view and a debt from a passive point of view. In other words it is a constraint put on a definite person in order to compel him to do or forbear from doing a definite act.

Scope of the law of things.

Property according to the Roman enumeration consists of ownership, *Jura in re aliena* and obligations. But the law of property is concerned with the first two of these topics and is

conveniently called the law of things, the law of obligations occupying a distinct category. Here, as somes have remarked, logic has been sacrified to lucidity.

First Division of the Law of Things—Ownership.

Ownership.

Ownership is the right "by virtue of which a person may enjoy all the advantages that an object may bestow." According to the Roman jurists the advantages may be grouped under the heads of.

(1) *Jus utendi* (or *usus*), *i.e.*, the right of using the thing in every possible way.

(2) *Jus fruendi* (or *fructus*), *i.e.*, the right of enjoying the fruits or the produce of a thing.

(3) The *jus abutendi* (or *abusus*), *i.e.*, the right of *waste*.

(4) The *jus disponendi*, *i.e.*, the right of alienating the thing owned. In other words property is an indefinitely definite right which allows the owner to use the thing over which the right exists in any way he likes until and unless he injures a like right of another.

Modes of acquisition.

Modes of acquisition of property denote the juridical facts in consequence of which ownership comes into being. Modes of acquisition have been

classified variously by various writers. According to Justinian, property in particular things is acquired either by natural or by civil modes. A natural mode is sometimes called an original mode in the sense that property is acquired for the first time in a thing which was without an owner. All natural modes are not, however, original modes. The important examples of natural modes are *occupatio* and *accessio*, while those of civil mode are *mancipatio*, *in jure cessio*, *adjudicatio*, *usucapio* and *lege*. [Sometimes *traditio* also is regarded as a civil-law mode of acquisition].

Occupatio.

Occupatio is the taking possession of things, which have no owner or which have ceased to have an owner, with a view to appropriation. The things to which the principle of *occupatio* applied fall under two heads—(1) animate objects, (2) inanimate objects.

Animate objects.

(a) Wild animals. These belonged to the taker. Justinian says,—"Wild beasts, birds, fish, *i.e.*, all animals which live either in the sea, the air, or on the earth, so soon as they are taken by any one immediately become the property of the captor." (J. II. 1. 12). By *occupatio*

property in wild animals might be acquired even though they were taken on another's land. (b) Wild animals in an enclosure. These belonged to the owner of the enclosure, *e.g.*, rabbits in a warren so long as they were there belonged to the owner of the warren ; but once they regained their liberty they could be acquired by *occupatio.* (c) Domestic animals. These even when they strayed or were not confined in any space, and wild animals which have a habit of returning to their owners (*animus revertendi*) could never be acquired by *occupatio.* [Merely wounding a wild beast is not capture, as Justinian says,—"Property can only be acquired by actual taking."] (d) Prisoners in war. These by *jus gentium* belonged to the captors.

Inanimate objects.

(a) Precious stones, gems etc., and other things found on the sea-shore. These became immediately the property of the finder. (b) Treasure-trove (*i.e.* gold and silver hidden in the ground, owner unknown). The law regarding treasure-trove was unsettled till the time of Justinian. Under him treasure-trove when found by any one of his own ground or when accidentally found in *loco sacro aut religioso* (sacred or

religious place) belonged to the finder. (c) Derelicts. Things wilfully abandoned are called derelicts. These could be acquired by *occupatio*. Things negligently left or abandoned on account of necessity (*e.g.*, jettison) always remained the property of the owner. (d) Immovables. These when acquired in war were, by *occupatio*, at the disposal of the state, the distribution among a group of takers being regulated by military law.

Accessio.

Accessio is a mode of acquisition founded on the rule—accessory falls to the principal (*accessio cedat principali*). Thus by *accessio* rents of houses, interests of money, young of animmals belonged to the owner of the principal objects. The things to which *accessio* applied fall under two classes, (1) immovables, (2) movables.

Immovables.

(*a*) House even though erected with another's materials belonged to the owner of the ground on which it stood. Indemnity had to be given to the owner of materials when the building was erected in good faith. The maxim—whatever is built on the soil falls to the soil (*solo cedit quod solo inædificatur*)—applied. So Justinian says,—"The owner of the materials in the case when

a house is built on a man's own ground with the materials of another does not cease to be the owner although he cannot lay any claim to the house." The owner of the materials could bring an action in accordance with the laws of the XII Tables for double the value of the materials so long as the building was standing. The object of this provision was to prevent the necessity of the building being pulled down. But if the building was destroyed through any cause, the owner of the materials, if he had not already obtained double value, might bring a *real* action for the materials and might demand to have them exhibited. (The action for the double value was called *actio de tigno injuncto*.) *(b)* Lands gained from the sea or the river either by alluvion or by the water gradually or imperceptibly receding accrued to the owner of the soil which received the addition. Temporary inundation did not change the ownership and when as the result of a sudden flood or by a strong gust of wind, land was deposited the principle of *accessio* did not apply. *(c)* Island in the sea belonged, by *occupatio*, to the first occupants, but if an island was formed in a river the ownership was determined, under

Justinian, according to the following rule:—When an island was formed in the middle, it belonged, conformably to the principle of *accessio*, to those who possessed the lands near the banks on each side of the river, in proportion to the extent along the banks of each man's estate. But if the island was nearer to one side than the other belonged to those only who possessed lands contiguous to the bank on that side. But if a river divided itself at a certain point and lower down united again thus giving to anyone's land the form of an island, the land still continued to belong to the person to whom it had belonged before. (J. II. 1. 22.)

Movables.

In the case of movables the natural modes of acquisition received various names from the commentators. Sometimes a title was not dissimilar to *accessio*, or *occupatio* yet it was called differently. Thus when raw materials were transformed into something different from the materials themselves, the *nova species* generally became the property of the maker by *specificatio*. Although regarded as a distinct mode of acquisition, *specificatio* is really a species of *occupatio* or *accessio*.

Specificatio.

When the labour and materials did not come from one and the same person, the question of ownership was unsettled. Justinian says "if the thing made can be reduced to its former rude materials the owner of the materials is the owner of the thing made," *e.g.*, a vessel when cast can easily be reduced to its rude materials of brass, silver or gold, so by *specificatio* the owner of the brass, silver or gold, as the case may be, is the owner of the vessel. If the thing cannot be so reduced then he, who has made it, is the owner of it, *e.g.*, flour cannot be re-converted into wheat or wine into grapes so the maker of the flour or of the wine is its owner. (It has been suggested that the rule of *specificatio* may be expressed by saying that in the case of reversible changes the property lies in the owner of the materials while in the case of irreversible changes it lies in the maker.) If a man makes a new thing partly with his own materials and partly with the materials of another, *e.g.*, if he has made mead with his own wine and another man's honey, then he, who made the thing, is the proprietor, because he not only gave his labour but also furnished a part of the materials. Here the question of ownership is

connected with the equity of the case. In all these cases the other party must be compensated.

When two liquids or any two materials were mixed together in such a way that they lost their individual characteristics, the result was termed *confusio* by the commentators. Here it is necessary to distinguish three cases.—(1) When the *confusio* is the result of intention of all the parties who were the owners of the materials before they were mixed together. In this case the property in the mixture belongs to all the owners in common. (2) When the mixture is a result of chance. Justinian says that here also the property in the mixture is common to all the parties. (3) When the mixture results from the act of one of the parties. Here although Justinian does not mention any rule in the text, the property in the new species according to the commentators went to the person who made the mixture; if the product was not a new thing it was a common property. Whenever the owners of the materials were deprived on any share in the new product they had to be compensated for the loss they sustained.

Confusio.

When different materials were mixed

Commixtio. together but they could be separated even after the mixture, the process of mixing was called *commixtio*, *e.g.*, when grains of wheat were mixed with grains of barley. In this case the property in the result lay in the owners of the materials in common if the mixture had taken place with common consent, if not with common consent then the materials (not the mixture) belonged to the individuals to whom they had belonged before the *commixtio*. The different rules of *specificatio confusio* and *commixtio* are shown in the table below :—

I Property in the owner of the materials—
Reducible ... ... *specificatio.*
(Except paintings).
Chance-mixture or by the act of one party ... *commixtio.*

II Property in the maker—
Not reducible—Part-proprietorship ... *specificatio.*
Act of one party in non-separable mixtures if the result is a new thing ... ... *confusio.*

III Common property—
Common consent ... *commixtio.*

Common consent or chance, or act of one party in a non-separable mixture if the result is *not* new product ... ... *confusio.*

Traditio.

Traditio (delivery) is the material putting of a thing under the control of the acquirer by the alienator. Ulpian in his list of the modes of acquiring property puts *traditio* in the same class with *usucapio*, *in jure cessio* etc., thus leading to the assumption that *traditio* is a civil mode of acquisition. Some jurists regard *traditio* as a natural mode, while others do not regard it as a distinct mode of acquisition at all.

Essentials of traditio.

According to Justinian two things are necessary for the transfer of property by *traditio* :—(1) *Justa causa.* Every *traditio* did not transfer property, *e.g.*, a thing might be delivered to a buyer, to a donee, or to a bailee. Only in the two former cases the property passed to the deliveree (*accipiens*). The *traditio* is then characterised by the intention accompanying it. It will effect a transfer of property when the deliveror and the deliveree so intend. This intention to

transfer property on some just ground, *e.g.* sale gift, marriage, etc., was called *justa causa.* (2) *Justa causa* alone will not do, the actual delivery of the thing in pursuance of the *justa causa* must take place or if the property was already in the possession of the traditee then the latter should be allowed to hold as an owner and not as a mere possessor. In the second case the delivery was called *traditio brevi manu.*

Fructuum perceptio.

Sometimes the gathering or taking the fruits of things (*fructuum perceptio*) was regarded as a natural mode of acquisition distinct from *occupatio* and *accessio.* In general the owner of property acquires its produce by reason of his *dominium* (ownership). But a person other than the owner might occasionally become the owner of the fruits of property by gathering them, *e.g.*, a lessee fructuary. In such cases the fruits did not become the property of the non-owner until they had been actually gathered.

Mancipatio.

Civil law modes of acquisition, (a) Mancipatio. This applied to *res mancipi.* Five witnesses and a balance holder *(libripens)* were necessary for the transaction. Only the Roman citizens and the peregrins having *jus commercii*

were allowed to take part in *mancipatio.* The acquirer, in presence of the witnessess and the *libripens*, touched either the object or a representative part of it and said, "I declare that this thing is mine *ex jure quiritium*, as I have purchased it by this copper and scale." After this declaration he touched the balance with a piece of copper. At the close of the ceremony the ownership was transferred to the acquirer.

In jure cessio.

(*b*) *In jure cessio* was a fictitious law-suit. The alienator and the acquirer went to a magistrate. The acquirer touching the object said—"I declare that this is my thing and behold I have laid my rod on this." The alienator kissed the rod saying "cedo," *i.e.*, I do not resist. The magistrate gave the thing to him who had claimed it without opposition. This method applied to *res mancipi* as well as to *res nec-mancipi.* It was practically a surrender in court.

Adjudicatio.

(*c*) When as the result of a verdict in a law-suit property was adjudged to some one, he was said to have acquired the thing by *adjudicatio*. It happened generally in actions for the partition of family-estate (*familiae erciscundae*) for the division of common property (*communi dividundo*) and also

in actions for fixing the boundary (*finium regundorum*).

(*d*) *Usucapio* was a kind of prescription. By *usucapio* property was acquired through prolonged possession. According to the XII Tables, the period of possession was one year for movables and two years for immovables. *Usucapio* was utilised mainly in two cases:—(1) When quiritary property was transferred by a non-quiritary method, *e.g.*, when property in an ox (a *res mancipi*) was transferred by *traditio*. (2) When a thing was alienated by a non-owner. In the first case equitable ownership called bonitarian (as opposed to quiritarian) ownership ripened into legal ownership (quiritarian ownership). In the second case the alienee having no title either quiritary or bonitary acquired quiritary ownership by *usucapio*.

Usucapio.

Before the time of Justinian *usucapio* was distinguished from *praescriptio longi temporis*. Usucapio applied to objects susceptible of quiritary ownership, *e.g.*, *res mancipi*, and availed for those who might become quiritary owners, *e.g.*, the Roman citizens. It did not provide for the acquisition of non-quiritary objects nor

Usucapio and *praescriptio.*

did it avail for a peregrin. This defect was remedied by the prætorian invention of *praescriptio longi temporis.* The latter was not, however a direct mode of acquisition. It was a prætorian defence (*exceptio*) which barred the remedy of the owner against the possessor when the latter had been in possession for a definite period. The following points must be noted in connection with *praescriptio longi temporis* and *usucapio* :—

(i) *Usucapio* was instituted by the XII Tables while *praescriptio* came through the prætor.

(ii) *Usucapio* gave an *actio* as well as an *exceptio* while *praescriptio* gave only an *exceptio.*

(iii) By *usucapio* property was acquired subject to a real right if any existing, but by *prescriptio* it might be acquired free from all charge.

(vi) *Praescriptio* was interrupted by joining issue (*litis contestatio*) while *usucapio* was not interrupted till the decree was pronounced.

(v) *Usucapio* applied to *res mancipi*, *praescriptio* applied to *res mancipi* as well as to *res-nec-mancipi.*

(vi) Both by *praescriptio* and by *usucapio* a non-owner became an owner through efflux of time.

The essential conditions for the operation of *usucapio* were :—

Requisites for *usucapio*.

(1) Time. It was necessary that the possession should have been continuous and uninterrupted for a definite period fixed by the law. Perhaps in the time of the XII Tables no other conditions were necessary but later on two more were added, *viz*., just title and good faith.

(2) Just title. A just title is a juridical fact explaining possession, *e.g*., a gift, a succession etc.

(3) Good faith (*bona-fides*). This is the ignorance of any defect in the title on which possession rests, *e.g*., if A buys a slave from B through a mistaken belief that B is the owner, the mistake does not affect A's *bona-fides*. [It must be noted that the scope of *usucapio* was limited by the nature of things. Certain objects could never be usucapted, *e.g*., stolen property (*res furtivi*), things possessed by voilence etc.]

Justinian's reform.

Justinian blended the old *usucapio* and *praescriptio longi temporis* so that the two terms lost their original meanings and were used interchangeably, although some jurists used the term *usucapio* in connexion with moveables and *praescriptio* in connexion

with immovables. The following rules were laid down by Justinian.

(1) Movables.—Title to movables was acquired by three years' undisturbed possession.

(2) Immovables.—Title to immovables was acquired by ten years' possession if the parties (*i.e.* owner and possessor) were domiciled in the same province (*inter presents*) and by twenty years' possession if the parties were domiciled in different provinces (*inter absentes*). Just title and good faith were necessary. The possession had to be peaceable and uninterrupted for these periods. But any one could add to his own period that of the person through whom he derived his possession, *e.g.*, the buyer could tack on to his period that of the seller. When the parties had resided in the same province during part of ten years, the deficiency was made up by counting two years' absence as one years' presence. After the period of prescription had elapsed the possessor acquired not only an *exceptio* but also an *actio* for revindication.

(3) *Praescriptio longi temporis.*—In the time of Justinian possession for 30 years gave property to a non-owner although the thing belonged to a class originally excepted from *usucapio* and the possessor had come in un

no title. This rule existed even in the time of Theodosius II, but Justinian improved on the rule by giving the possessor not only an *exceptio* but also an action in revindication.

(4) *Praescriptio longissimi temporis.*—A prescription of forty years, whereby property was acquired although the possessor had come in under no title and even in bad faith, was reserved for special cases. This was called *praescriptio longissimi temporis.* It generally applied to ecclesiastical property.

Interruption of prescription.

Prescription was interrupted by any act whereby the proprietor or the creditor exercised his right. The interruption was natural when the possessor was deprived of his possession by the true owner or when the property became a *res extra commercium, e.g.*, when a temple was built on the land. The interruption was civil when judicial proceedings were taken by the owner before the period of prescription was complete. The effect of interruption was that the possessor had to begin a new course of possession since interruption.

Time began to run from the moment a right could be sued on judically, *e.g.*, when a debt depended upon a

condition time began to run from the moment the condition was satisfied The operation of prescription was suspended during the minority of the person entitled to challenge. (So in computing, years of minority must be deducted.) The course of prescription was suspended for various other reasons, *e.g.*, prescription was suspended during the period allowed to heirs to deliberate whether they would take up the inheritance.

(*e*) When law gave vindicatory actions to a determinate person, the latter was said to acquire the property, which formed the subject-matter of the action, by law (*lege*), *e.g.* certain legatees were favoured by special actions and acquired the legacy by force of law.

Acquisition *lege.*

Ownership was extinguished when the object (*i.e.*, the property ceased to exist either naturally or civilly, *e.g.*, when a thing became *divini juris* it ceased to exist civilly. When a thing was abandoned by its owners, according to the Proculians it remained the property of the original owners until a third part of it was destroyed, according to the Sabinians it became *res nullius* from the moment of *derelicto.* The latter view was adopted by Justinian.

Extinction of ownership.

Second Division of the Law of Things—Jura in re aliena.

Jura in re aliena.

The Digest says "Sometimes it happens that some of the elements of ownership are taken away from the owner and given to another." This dismembering of ownership took place in civil as well as in prætorian law resulting in *jura in re aliena.* The civil-law dismemberments formed the *servitudes*, while the praetorian dismemberments formed the *superficies*, *emphyteusis* and *hypothec.*

Servitudes

A servitude according to the Romans jurists was "a real right, vested in or annexed to a definite person or piece of land, over some object belonging to another, and limiting the enjoyment of that object in a definite manner."

Servitudes were either *praedial* or *personal.* A *praedial* servitude was a burden imposed on a particular *praedium* (land or, immovable property) in favour of another *praedium.* The land so burdened was termed the *servent tenement* and the land benefited was termed the *dominant tenement.* A personal servitude on the other hand was a *jus in rem* granted to a *particular person* over a *particular thing* belonging to another.

Praedial servitudes were divided into rural and urban. A rural servitude did not imply the existence of a building or any other superstructure on land. The jurists said "rural servitudes refer to land alone." (*in solo consistunt.*) An urban servitude necessitated the existence of a building or some structure raised on land. The jurists said "urban servitudes refer to buildings alone." (*in aedibus consistunt*).

Division of *praedial* servitudes.

Sometimes servitudes were classified into positive servitudes and negative servitudes (*servitutes in habendo vel faciendo* and *servitutes in prohibendo*); *e.g.*, the right of support, the right of passage were positive servitudes because the owner of the dominant tenement could do something in the servient tenement, while the servitude of *altius non tollendi* (not building higher than a certain altitude) was a negative servitude because the owner of the dominant estate could prevent the owner of the servient estate from action to the detriment of the former. [Two maxims of Roman law are to be remembered in connexion with servitudes :—(1) No one can have a servitude on his own land (*nulli res sua servit.*) (2) Servitude does not consist in doing anything (*servitus in*

faciendo consistere non potest). These two maxims have special reference to praedial servitudes.]

Rural servitudes.

The principal rural servitudes were :—(1) Servitude of passage. *(a) Iter.* This was the right to pass over the land of another either on foot or on horseback or in a litter. *(b) Actus.* This was the right to use a road through the land of another for carriages and for driving cattle or beasts of burden. *(c) Via.* This included *iter* and *actus* and was the most complete right of passage. The road could be used in this case for dragging stones, wood and building materials.

In the case of servitude of passage there was no obligation on the servient owner to maintain and repair the road, the dominant owner had to do so at his own expense.

(2) *Aquaehaustus.* This was the right of drawing water from the well of another for domestic purposes.

(3) *Aquaeductus.* This was the right of leading water by a conduit or a canal running through the land of another person.

(4) *Jus pascendi pecoris.* This was the right of pasturing cattle upon the land of another person.

(5) *Calcis coquendae.* This was the right of burning chalk on the land of the servient tenant.

Urban servitudes.

The principal urban servitudes were :—

(1) *Oneris ferendi* (*i.e.*, the servitude of support). This was the right of resting the whole or a part of a building on the land or the house-wall of the servient owner. The servient tenant had to keep his own property in repair so as to make it strong enough to support the burden. (This was the only servitude where an active duty was cast on the servient tenant.)

(2) *Jus tigni immittendi.* This was the right of fixing a beam in the wall of the servient tenant.

(3) *Stillicidii vel fluminis recipiendi.* This was the servitude of receiving rain-water, falling either in drops or in quantity from the roof of the dominant tenant.

(4) *Altius non tolendi.* This was the servitude of not raising a structure beyond a certain height and not constructing it in such a way as to shut out the light or prospect of the dominant tenement.

Acquisition of Praedial Servitudes.

The oldest rural servitudes were constituted by mancipatio, convention, testament and prescription. Servitudes in Italian soil were constitut

generally by *cessio in jure* as well as by *adjudicatio* and in provincial soil by convention (*i.e.*, pacts and stipulations.) In the time of Justinian the distinction between Italian and provincial soil was abolished and servitudes were frequently constituted by pacts and stipulations.

Extinction of praedial servitudes.

(1) Confusion (merger). When the dominant and servient tenements came into the hands of the same proprietor the lesser right (servitude) was merged into the greater right (ownership) and consequently extinguished. (2) By the renunciation of the ownership of the dominant tenement the servitude over the servient tenement was lost. (3) Sometimes servitudes were extinguished by natural circumstances *e.g.* when the dominant or the servient tenement was destroyed by an earthquake. (4) By non-usage for a term necessary for negative prescription servitude was destroyed (*e.g.* non-user for ten years *inter presentes*, and twenty years *inter absentes*). In the case of positive servitudes simple non-user was sufficient but in the case of negative servitudes non-user had to be accompanied by a [illegible]itive act on the part of the servient tenant [illegible]d servitude was lost if the act remained

unchallenged for the prescriptive period. (In the last case the servient tenant was said to have benefited by a *usucapio libertatis*).

Personal servitudes.

Personal servitudes, as already noticed existed not on one land for the benefit of another land but on a definite thing for the benefit of a definite person or a class of persons. They were four in number. (1) *Usufruct*, (2) *Usus*, (3) *Habitatio*, (4) *Operae servorum vel animalium*.

Usufruct.

This was the right of using another's property and enjoying its fruits without impairing its substance. Strictly speaking usufruct would apply to such things as are not consumed in the use. Things which perished in the use *e.g.* wine, coined money, were made objects of quasi-servitude by a constitution of one of the emperors. The usufructuary had to give a security to restore the amount of the thing on expiry of his right, failing that he had to pay an equivalent in money.

Constitution of Usufructs.

Usufructs were constituted (a) *mortis causa* by a will (b) *inter vivos* by *adjudicatio mancipatio*. By *mancipatio* usufruct was created by way of reservation (deductio) *e.g.* the land was mancipated with the

condition that the usufruct would belong to a person other than the mancipatee. The latter in such a case had the bare ownership called *nuda proprietas.* During the pre-Justinian period usufruct on provincial lands was established by contracts. In some cases usufruct arose *ex lege e.g.* the *peculium adventitium* of the son.

Rights and duties of the fructuary.

The fructuary had the right of using (*jus utendi*) and the right of enjoying the fruits of the property (*jus fruendi*) but not the right of wasting the substance (*jus abutendi*). So he was entitled to the fruits, civil and natural, of the thing but the thing had to be maintained in the condition in which he had received it. He was not allowed even to change it for the better. Fruits included the young of animals but not the offspring of slaves. The produce of mines and quarries went to the fructuary if these had been in work before the commencement of the usufruct. The usufruct like other servitudes was in a sense non-alienable, that is to say the fructuary could not cede his rights so as to free himself from the duties imposed on him by the usufruct although he could allow another to enjoy the benefits of the usufruct. The fructuary had to exercise the care

of a *bonus paterfamilias* over the property and had to return it at the expiry of the period of the usufruct in the condition in which he had received it. He had to give a security for the safe return of the thing. He had to execute necessary repairs and to defray the annual burdens. Vines, fruit-trees and ornamental timber, even though destroyed accidentally, had to be re-placed. In the case of cattle the original number of the herd had to be kept up. The fructuary was not entitled to put the thing to inferior uses.

Extinction of usufruct.

(*a*) By expiry of the period for which it was granted when the usufruct was for a limited time. (*b*) By the death of the usufructuary. (*c*) When created for another's life usufruct ceased on the death of that person. (*d*) Before the time of Justinian by the three *capitis deminutiones*. But Justinian enacted that only the *capitis deminutio maxima* and *media* would destroy the usufruct. (*e*) When the thing itself was destroyed. (*f*) By confusion, *i.e.*, merger. (*g*) By non-user for ten years *inter presentes* and twenty years *inter absentes*. (*h*) When the usufruct belonged to a juristic person, *e.g.*, a corporation, it ceased either when then the

corporation was dissolved or after hundred years from the date of incorporation unless there was a contrary provision in the incorporating charter.

Usus.

Literally usus was usufruct minus the *jus fruendi* and, strictly speaking, it conferred only the jus utendi on the *usuary e.g.* a person having the usus of cattle could use them for manuring his field, but could not take their trusts or produce such as milk. But in practice the person was allowed to take a small quantity of milk when he had usus of a cow. It may be said that usus was a restricted usufruct. It was constituted and extinguished in the same way as usufruct.

Habitatio.

The right to live in another's house gratuitously was called habitatio. Under Justinian the person having it could live in the house himself or could let it to another for recidental purposes. Habitatio was not lost by non-user nor by capitis deminutio minima even before Justinian.

Operæ.

The right to the services of slaves or labour of animals belonging to another was known as *operae servorum vel animalium*. When the operæ were lest as legacy they passed to the heirs of the

legatee and could be enjoyed so long as the slave or the animals lived. Operæ were not lost by non-user or by capitis deminutio minima even before Justinian.

Prætorian dismemberment of ownership.

The prætor was mainly responsible for the following :—

Emphyteusis is an imitation of perpetual bailment. Originally land was let out perpetually or for an indefinite term to those who rendered it arable by clearing the land of noxious weeds. Large tracts of lands called *latifundia* became thus more productive and persons who had the lease for an indefinite period could sell their rights, transmit it to their heirs acquire the fruits by separation. They had to pay a fixed annual rent to the owner of the soil. The rent was called *vectigal* if the land belonged to a city or a corporation, and *redious* in all other cases. If rent was in arrear for two years, the holder lost his right to the land. The prætor protected the rights of the holder by an action called *actio vectigalis* available even against the owner of the land when there were no arrears of rent. Thus protected the ager

Emphyteusis.

vectigalis, as the land let out by a municipium was called, became an object of important right. Although this right was based on a contract, the nature of the contract, *viz.* whether the contract was one of sale or lease, was unsettled till the emperor Zeno declared that it was neither a sale nor a lease, but a new species of contract, a contract of emphyteusis regulated by its own provisions. Emphyteusis as Maine points out, marks an important stage in the history of land tenure. It is the initial idea that finally led to feudalism.

How created.

Emphyteusis was established either by a convention or by a testament. According to some commentators it could be acquired by prescription although there is no original text in support of this view.

Rights and obligations of the emphyteuta.

Theoritically emphyteusis was a *jus in re aliena* but practically it was a *dominium utile.* The grantee had Jus utendi, jus possidendi and a qualified right of waste. He could sell his right and it descended to his heirs on death. When the owner of the soil had a right of pre-emption (and for every alienation by the emphyteuta to a stranger) a fine called *laudemium*, fixed by Justinian at the 50th part of the price or the

value of the land, could be levied by the dominus. When the emphyteuta committed such waste as diminished the value of the land he forfeited all his rights and the land went back to the proprietor. Non-payment of rent for two years in the case of Church property and three in the case of other lands had precisely the same effect.

Termination.

The right was extinguished by (1) consent, (2) non-payment of rent, (3) total destruction of the object, (4) expiry of the period when the grant was for a fixed period, (5) the grantee dying without leaving heirs.

Superficies.

When a man built a house on another's land with the permission of the owner according to *jus civile* the house became the property of the owner of the land, the maxim being *superficies solo cedit*. But it was a customary rule, which the prætor enforced, that in such a case the builder had full right of possession and enjoyment of the house so long as a fixed rent called "solarium" was paid. The right of the builder, known as *jus superficiarium*, was heritable as well as alienable *inter vivos*. When superficies became frequent the prætor allowed it to be constituted by a

contract. The contract regulated the incidents of the right. The right might be granted either for a price or for an annual payment. (Cf.: The building leases of modern times).

Hypothec.

Hypothec, as the word shows, is of Greek origin. The Romans, however, improved on the original Greek form and made it an institution considerably superior to the Greek one. Originally hypothec was used in the case of a locator (lessor) of a farm who wanted a security for the payment of rent from the farmer-lessee. The farmer had, in general, no other property than the agricultural implements. Now these were the tools of his trade and he could ill afford to part with them. So he was allowed to retain the possession of the necessities of his calling and to give a security whereby he bound himself as a debtor to his creditor land-lord. The latter in default of payment of the annual rent could bring an *actio in rem* for distress of the goods of the farmer. This action was named after the prætor Servius "actio serviana." The advantage of a hypothec was that the debtor parted neither with the ownership nor with the possession of the property while the creditor had a security realisable by action. Hypothec

was subsequently generalised by the prætors so as to make it applicable to farmers and non-farmers alike. The action available to non farmers was called actio quasi-serviana or hypothecaria. Hopothec might arise: (1) By implication of law (tacit hypothec *e.g.* a pupil had a tacit hypothec over his tutor's property). (2) By a judical decision, (3) By an agreement. In an agreement creating a hypothec no traditio was necessary.

CHAPTER IV.

OBLIGATIONS.

Obligations.

Cuq says, when we study the composition of a Roman household we find there are certain persons free by birth yet retained in bondage by the head of the family. These are the debtors who have not been able to pay their debt and are called the *obligati, i.e.* (the bound ones). From the obligati is derived the Roman idea of *obligation* which is defined as a bond of law (*vinculum juris*) that compels one to give to do or to forbear from doing something.

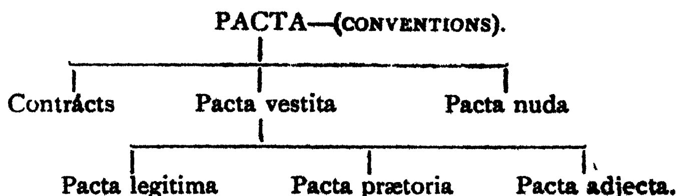
An obligation may be :—(i) Natural, *e.g.* when a person is morally bound although he cannot be compelled by a civil action to the performance. A prætorian exceptio availed in general for a natural obligation *e.g.* when a debtor paid his statute-barred debt the creditor could retain the money because the debtor was bound by a natural obligation.

(ii) Civil *i.e.* an obligation recognised by civil law and enforceable by civil actions.

The main sources of obligation are contracts quasi-contracts, delicts and quasi-delicts.

Contracts.

A contract is a bilateral convention specially protected by civil law. A convention is a pact between two or more parties regarding a matter in which they are interested. A contract is a species of the genus pact. Every contract is a pact but every pact is not a contract. A pact was called nude when it was a promised not covered by an action although an exception might be available.



Elements of a contract.—The essential elements are three in number (i) object (ii) cause (iii) an agreement of will (concensus).

Object.

(i) The object of a contract is what the promisor engages to do and the promisee expects to get. In general each party to a contract expects a specific thing and therefore the object depends on the point of view of each of the parties. Thus in a contract of sale the seller's object is the price and the buyer's object is the thing to be sold.

The object must satisfy the following conditions :—

(a) The object must be possible *e.g.* an agreement to sell a hippocentaur is void.

(b) The object must be lawful *e.g.* an agreement of one man that he should kill another is bad.

(c) The object must be determinate *e.g.* the slave X.

(d) The object must be useful to the promisee *i.e.* he should be a gainer *e.g.* an agreement to sell a slave on the owner of the slave is bad.

Causa.

(ii) Causa means the generative fact *i.e.* the source of a contract. A causa may be (a) naturalis (b) civilis. A causa naturalis is the motive which determines a party to a contract *e.g.* in a contract of sale the causa naturalis is the gain of the price by the seller. A causa civilis is the form that makes an agreement binding in law *e.g.* in a stipulation the causa civilis consists of the words pronounced.

Consensus.

(iii) Consensus of parties is an important element. It is this that gives the general name to an agreement. The consent must be free and not vitiated by error or fraud or violence or incapacity.

Error must be essential and not merely accidental. There is no fixed rule for determining an essential error. Generally an error is regarded as essential if the party injured would not have contracted had he known of its existence.

Error.

Fraud (*dolus malus*), as defined by Labeo, is an artifice, trick or machination for the purpose of deceiving others. When fraud leads a party to enter into an agreement the agreement is invalid.

Fraud,

Violence is a ground of nullity when it is of such nature as to cause alarm in the mind of an ordinarily intelligent person.

Violence.

Incapacity may be *de jure* or *de facto*. It is *de jure* when due to special enactment, *e.g.*, women were *de jure* incapable in certain specified cases. It is *de facto* on account of age or physical defect.

Incapacity.

Accidental elements of a contract are called modalities in Roman Law. These are clauses which modify the existence, performance or dissolution of a contract. Thus the conditional clause, "I will pay my debt to you when X comes back from Asia," is a modality. When a

Accidental elements.

contract is entered into without any condition it has to be performed immediately.

Different kinds of contract.

The principal contracts in Roman Law were grouped under the four heads of *re*, *verbis*, *literis*, and *consensu*. When an obligation was contracted by a thing (*re*), it was called a contract *re*. In other words it was a *real* contract which was perfected when something had passed from one party to the other. An obligation contracted by means of solemn words was a contract *verbis*. The contracts *verbis* were generally called stipulations. A contract *literis* was a contract enforceable in civil law because there was a written acknowledgment of an obligation to pay a debt. A contract *consensu* was constituted by mere consent of the parties to the contract.

Contracts Re.

The chief examples of contracts re are *Mutuum*, *Commondatum*, *Depositum* and *Pignus*.

Mutuum.

Mutuum is a contract whereby one person called the deliver (*tradens* or *mutuodans*) transfer to another person called the deliveree (*accipiens*) the ownership in a definite quantity of a fungible

thing on condition that the *accipiens* will return to the *tradens* a similar quantity of the thing of same nature and of identical quality. In general terms a *mutuum* is a loan for consumption.

Elements mutuum

The essential elements of *mutuum* are (1) the actual delivery of the thing, (2) the thing should be restitutible in kind, (3) the ownership should be in the lender, (4) the lender should be able to transfer ownership.

Obligations of the borrower.

The borrower must return as much of the same kind and quality of a thing as he received ; failing this he was liable to a personal action called *condictio certi*. (This action was not available in the case of one who lent money to a *filiusfamilias* under the potestas of the father, on account of the S. C. Macedonianum). There was no implied obligation to pay interest on money received. The action for interest was based on an accessory contract if there was any, *e.g.*, special stipulation for interest.

Commodatum.

Commodatum is a loan for use. It is a real contract whereby one person gratuitously transfers to another

the custody and use of a thing on condition that the thing is to be returned in specie. The loan must be gratuitous because if any thing be paid for use the transaction becomes one of hiring (*locatio conductio*).

Obligations of the borrower.

The borrower should use the thing for the purpose for which it is lent. If he uses it otherwise he will be liable for theft of use (*furtum usus*). He must return the identical thing. He must make good all the injuries to the thing due to his carelessness. He is not held responsible for accidental losses unless he detained the article beyond the period for which he was to use it.

Depositum.

Depositum is a contract whereby a person the depositor, makes over a thing to another, the depositee, who is bound to guard it gratuitously and return it to the depositor on demand.

How formed.

The deposit is formed by transferring the detentio to the depositee. The deposit is essentially gratuitous and applies to movables only when they are regarded in specie. The same and the identical thing is to be returned. Depositum is gratuitous; if the depositee demand any pay-

ment, the deposit becomes a hire or any other innominate contract.

He is obliged to return the thing on demand. He is in a way a debtor with regard to a certain thing. Consequently he is free when the thing perishes without his fault *viz.* by an accident or vis major. His responsibility differs from that of a commodatarious, for the deposit is in the interest of the depositor alone. So the depositee is liable only for gross negligence. He is not liable for slight faults unless there was a contrary agreement or unless he made an offer to receive unsolicited by the depositor. Besides the obligation to restore he is bound to make good any loss consequent on his use of the thing deposited, because he could never use it unless there was a contrary agreement. If he used it in bad faith he was liable for *furtum usus* (theft of use). The depositee is bound to return the thing on demand even if the deposit is for a fixed period. The depositor had the actio depositi directa for constraining a return. The action entailed infamia as a consequence. In ancient law condemnation was always for double the value of the thing deposited. In classical times action

Obligations of the depositee.

for double the value was allowed only for what was called *depositum miserabile* that is to say for deposit made under compulsion of unfavourable circumstances *e.g.* shipwreck, fire.

Obligations of the depositor.

The depositor might be required to indemnify the depositee for any loss consequent on the deposit. All expenses for keeping must be paid by the depositor. Actio depositi contraria was available for single value.

Sequestration.

[As a special instance of deposit may be mentioned sequestration. It was a deposit of a thing which formed the object of litigation between two or more parties. The depositee called the *sequester* had to make over the thing to the winning party. The points to be noted are: (a) Immovables might be sequestered and even persons; (b) the sequester had true possession but the benefit went to the winning party.]

Pignus.

Pignus is a contract by which a debtor, or any other person on behalf of the debtor, makes over a thing to a creditor by way of security for money borrowed, with the condition that the creditor is to return the thing when the debt is satisfied. Although it presents some analogies to commodatum and

depositum yet it is to be distinguished from either of these by the fact that it is an accessory contract that is to say it is superadded to another contract as a guarantee strengthening the existing obligation.

Formation.

The delivery of the thing to the pledgee perfects the contract. The pledgee gets more than mere detentio, he acquires the possession although the ownership remains with the pledgor. Originally movables alone could be given in pledge.

Obligations of the pledgee.

He must return the thing when the debt is satisfied. As he is bound with regard to a definite thing his obligation ceases when the thing perishes without his fault and as the contract benefits him as well as the pledgor, he is bound to exercise the care of a bonus paterfamilias for protecting the thing pledged. He is liable for any damage to the thing. He could not use the thing or make any profit out of it. By a special pact known as *pactum antichresis* he was allowed to take the profits in lieu of interest on money lent. Before Constantine altered the law, when a pledge was accompanied by a stipulation called *lex commissoria*, the thing pledged became the absolute property of the pledgee

on non-payment of the debt at the time agreed upon. When the creditor sold the object for realising the amount, excess of price over the loan had to be paid to the pledgor. The pledgor had *pigneratitia directa* against the pledgee for enforcing this obligation. As a general rule the power of sale was exercised without judicial authority, according to the terms of the contract. In absence of any special agreement, by a law of Justinian the sale could not take place till 2 years had elapsed from the date of the notice of sale to the debtor or of a judicial sentence obtained against him.

Obligations of the pledgor.

(1) He should indemnify the pledgee against any loss unless the pledge was given to accommodate a third party and then the pledgor was liable for his own dolus. (2) He should recompense the pledgee for expenses incurred to preserve the thing in good condition. (3) If the pledge was given in bad faith, *e.g.*, when the pledgor knew there was a hypothec over the object the pledgor was liable to a delictual action. The pledgee had *pigneratitia contraria* against the pledgor.

Contracts verbis.

Of the three verbal contracts stipulatio, dictio dotis, jurata promissio liberti, the first is the most important.

It was sometimes used as an accessory contract *e.g.* *stipulatio* might modify some of the non-essential incidents of a mutuum.

How formed.

The obligation in the case of *stipulatio* was contracted in the form of question and answer.

e.g.—Q. Spondes? (Do you engage?)
A. Spondeo. (I engage).
Q. Dabis? (Will you give?)
A. Dabo. (I will give).
Q. Promittis? (Do you promise?)
A. Promitto. (I promise.) etc.

The questions and answers might be in Greek or in Latin. It is generally said that the form *Spondes? Spondeo* was restricted to the Roman citizens in early law—a restriction removed in the time of Justinian.

Essentials of a *Stipulatio*.

The essentials of a stipulatio do not differ from those of other contracts. In fact stipulatio is a typical contract and the rules stated by the authorities as the rules of stipulatio are applicable to contracts generally *e.g.* consensus, certainty of object, legality of object, etc. As it was a verbal contract pure and sole no writing was necessary as a condition of enforceability. The creditor (called the stipulator) put the question

to the debtor and the latter replied unconditionally, taking upon himself the obligation to pay a debt or to do a certain work. No other formalities were required to perfect the contract.

[As an example of a contract perfected by stipulatio may be mentioned *fidejussio*. It was a contract of suretyship. A surety might be interposed in natural as well as in civil obligations. The liabilities of a surety could be varied by stipulations].

Contracts literis.

An obligatio literis was an obligation arising out of a written acknowledgment of debt. In the case of a loan of money an action called *condictio in chirographo* was allowed. This action could not be brought within two years from the date of the acknowledgment. If an action was brought within two years, the prætorian defence called *exceptio non-numeratæ pecuniæ* was available which put the onus of proving the debt on the creditor. After two years the exceptio could not be pleaded.

Consensual contracts.

The chief examples of consensual contracts are sale, hire, partnership and mandate. The peculiarity of all these being that they are consti-

tuted by mere consent of the parties to the contract.

Sale.

The sale (*emptio venditio*) is a consensual contract by which a party engages to deliver a thing to another for a fixed sum of money called the price. The party who is bound to deliver is called the seller (venditor) and his rights are sanctioned by the *actio vendity*; the party bound to pay the price is called the buyer (emptor). He has the *actio empti*. The whole transaction is called *emptio venditio*.

Elements of a sale.

The essential elements of a sale are (1) a thing, (2) a money-price, (3) the agreement of the parties as to the thing and the price. (*Res, pretium* and *consensus*).

Res.—All *res in commercio* could be sold, an existing as well as a future object. Pretium—The price should be paid in money. It should be (1) certain, that is to say determined or determinable by experts, (2) real *i.e.* not nominal or worthless, (3) not excessively low.

[In the time of Diocletian when the price was less than half the value (laesio ultra dimidium) the seller could rescind the contract unless the buyer had made a special agreement to the

contrary]. Consensus—Consent might be given either verbally *inter presentes* or by a letter or by a messenger (nuncius).

Formation of the contract.

The contract of sale is perfected as soon as the parties agree as to the thing and the price, although no document has been executed nor has the price been paid. Justinian, however, made it a rule that when the parties agreed that a sale should be in writing, until the terms were put down on paper the contract was an agreement to sell and not a sale proper.

Earnest money.

Earnest money was a payment made at the time of the contract as a proof of earnestness of the parties. It was a *signum contractae emptionis* (a sign of the contract of sale). In the time of Justinian the earnest money had to be paid in specie and could be deducted from the price. Each party to the contract might rescind the contract even though the earnest money had been paid, the buyer by forfeiting the money, the seller by paying double the amount to the buyer.

Effects of sale.

The sale in Roman law produced an obligation to deliver a thing, but did not effect a transfer. The buyer in English or in Indian law generally

becomes an owner as soon as the contract is completed but in Roman Law he was a creditor for the goods sold. He became the owner after traditio or mancipatio if the thing was res mancipi (Res furtivae could never be sold).

Obligations of the vendor.

The seller must (1) the secure possession to the buyer tradere vacuam possessionem) (2) guarantee this possession against eviction (ob evictionem se obligare). (3) To these some commentators add absence of dolus malus (purgari dolo malo).

Obligations to deliver.

This obligation is executed by putting the thing under the control of the buyer *i.e.* by tradio in the case of *res nec mancipi*, mancipatio in the case of *res mancipi*. Unless the bargain was upon credit the seller was not bound to deliver till the price was paid and interest was due when payment was over-delayed.

Guarantee.

The obligation to guarantee continued and peaceable possession is said to be a prolongation of the obligation to deliver the thing. It is not only sufficient that the vendor should make over possession to the buyer but it is necessary that he should warrant the title to the buyer. He should furth

warrant the thing sold against secret faults. The seller is bound to secure the buyer against eviction.

Periculum rei.

Although property is not transferred by the contract alone yet the risks pass to the purchaser before delivery, the only conditions being (1) object of the contract should be specific, (2) price should be certain. [Exceptions (1) When the loss is due to seller's fault *e.g.* by delaying delivery (2) when by special agreement the risk is on the seller. In both these cases the loss falls on the seller.]

Special conditions.

Sometimes certain special conditions were added to a contract of sale. The effect of these conditions was generally resolutive. As examples may be mentioned : (1) re-sale on non-payment of price, (2) re-caption on paying back the price.

Sale rescinded.

The sale could be rescinded by mutual consent. It was voidable for breach of conditions, fraud, error or force.

Locatio conductio. (Hiring).

It is a contract whereby a party engages to give the use of a thing to another for a limited time (locatio conductio rei) or to lend his services (locatio conductio operarum) or to do a particular work (locatio

conductio operis) for a fixed sum of money called the hire (merces).

Obligations of the locator.

(1) He should put the conductor in possession.

(2) He should maintain the thing fit for the purpose for which it is lent.

(3) He should guarantee peaceable enjoyment.

Obligations of the conductor.

(1) He should pay the merces as agreed upon.

(2) He should use the objects as a bonus pater-familias and put it to no other use than that for which it was hired.

(3) He should restore the thing at the end of the term. In the case of a lease of a house the lessee (conductor) was bound to vacate whenever the lessor wanted the premisses for his own use.

(4) He is answerable for negligence but not for accidental loss.

Locatio conductio operarum.

The rights and duties depended on the nature of the work. Generally these were regulated by a *stipulatio* or by custom.

Locatio conductor operis.

The conductor should execute the work taken, the locator should pay the merces fixed by the the agreement. The work is undertaken at the risk

of the conductor and if the thing perishes bofore delivery is taken by the locator the latter is not bound to pay the merces.

Locatio conductio rei was terminated (1) by the intention of both parties and consequently at the expiry of the period of bailment. But if the lessee of a farm were allowed to remain in possession after the expiry of term there was a tacit *relocatio*. The renewed lease was not however for the original period but was from year to year or for such a period as was consistent with the nature of the object let. (2) By the intention of one party if the other party did not perform his part. (3) By the destruction of the object let.

Extinction of locatio conductio.

Societas (partnership) is a contract whereby two or more persons agree to combine property or labour in a common stock for the sake of sharing the gain. Partnership may be (1) regarding all the property of the partners (*societas universorum bonorum*) (2) regarding profits made in business dealings (*societas universorum quae ex quaestu veniunt*) (3) regarding the profits of a particular undertaking (*societas negotiationis alicuius*).

Societas (partnership).

The contract is completed by consent. The

How formed.

four essential elements being :— (*a*) A share of the partners, the share being in money, kind or work. (*b*) common interest. [If the agreement be that one of the two partners is to bear the whole loss and the other to get the whole profit the agreement is called a leonine agreement and a *societas leonina* is void.] (*c*) Intention to form a partnership (*affectus societatis*). (*d*) Lawful object.

Obligations of the partners.

(1) The partners must contribute their shares in money or in labour. (2) They should share the loss when loss occurs in partnership business. (3) They must act in concert. They are responsible for loss due to negligence but not for accidental loss. (4) If one of the partners has advanced money or entered into some engagement, on account of the partnership business, for which he is bound to indemnify a third party, each of the partners must rateably contribute to the indemnity; and if any become insolvent the solvent members must by rateable contribution make up the deficiency. These obligations were enforce by *actio pro socio*. Partnership is not an incorporating contract.

Relation of partnership to a third party.

Therefore when a partner deals with a third person by agreeing to allow him a share in the partnership

business, the stranger does not thereby become a partner. He can enforce his claim against that particular partner but not against all the partners because *socii socius mei socius meus non est*. (My partner is not a partner of my partners).

Dissolution : Partnership is dissolved :—

(1) Ex personis : by death or capitis deminutio or bankruptcy of a partner. (2) Ex rebus : (*a*) by expiry of time when the agreement was for a fixed time, (*b*) by completion of the work when the partnership was for carrying out a particular work, (*c*) by the loss of the partnership capital. (3) Ex voluntate—by the consensus of the partners, *e.g.* when one of the partners retires or the business is wound up. (4) Ex actione—by one partner bringing a suit for dissolution, the partnership is dissolved by order of court.

Mandatum : Mandate is a consensual contract whereby one person confides the management of some business to another who undertakes to do it *gratuitously*. The person who gives the work is called the mandant and who undertakes it is called the mandatary.

How constituted. It might be constituted either verbally or by latter or *ex rebus ipsis et factis* (by allowing another to execute a work.) The essential elements of a

mandate were (1) good faith, (2) interest of mandant or a third party, (3) gratuitousness of the service.

Powers and obligations of the mandatary.

Mandatary may be given general or particular powers. He must always act within his powers and is liable for negligence. He can better the condition of the mandant but cannot make it worse. He can claim compensation for loss when acting within the limits of his authority. The mandatary had *actio mandati contraria* while the mandant had *actio mandati directa* for enforcing their respective claims.

Termination. Mandate was terminated :—

1. By consent of both the parties.

2. By renunciation when the things are entire, that is to say when nothing has been done pursuant to the mandate.

3. By revocation of authority by the mandant.

4. By death of mandant.

Innominate contracts.

According to the Roman jurists a contract without a specific name (as *mutuum*, *pignus*) and unprotected by a special action is an innominate contract. The innominate contracts may be (1) *Do ut des* ; (2) *or Do ut facias* ; (3) *or Facio*

ut des; (4) *or Facio ut Facias*; according as the obligation has reference to an act for an act, an act for a promise, a promise for an act or a promise for a promise.

Principal innominate contracts.

The important innominate contracts are (1) exchange, (2) *donatio sub modo* (3) aestimatum. Of these exchange is of importance in that it is the primary aspect of sale. It was perfected when one of the parties had given a thing to another so that the party receiving it might give a thing in return. It was a contract in the class *do ut des.* As there was no special action for exchange it was sanctioned by a general *actio in factum.*

Donations.

[For the sake of completeness some examples of *pacta legitima—pactum donationis* and *pactum dotis*—may be noticed here. These of course are not contracts. According to the digest "donation consists in one person giving something from generosity alone and without any antecedent obligation to another who accepts it." Originally donations were not covered by any action but in the reign of Antoninus Pius a donation between ascendants and decendants was sanctioned by an action called the *condictio ex lege* and

consequently became a *pactum vestitum*. The famous Cincian law regarding donations passed about 203 B. C. prohibited donations beyond a certain limit—a restriction removed in latter times.

Donations connected with marriage

Of the donations *inter vivos* the most important are the *donatio ante nuptias* the *donatio post nuptias* (*i.e.*, donations before marriage and after marriage) and *dos* (dowry). The donations between the spouses (ante nuptias and post nuptias) were according to Ulpian prohibited by custom, but a constitution of Antoninus Caracalla *(Oratio Antomini)* decided that gifts between the spouses, although void in principle, might be regarded valid if the donor died *in matrimonio* without revoking the gift by a will.

Dos.

When a woman was married *cum manu* her property became merged into that of her husband, but in a marriage *sine manu* the wife retained the administration, enjoyment and disposition of her separate property. In the latter case the wife would generally make over a portion of her separate property to the husband. This portion constituted the *dos* (dowry) and was distinguish

from the rest of her property called the *paraphernalia*. When the dowry came from the father it was called *profectitia*. In other cases it was called *adventitia*. When a third party had made the advance with the condition that it should return to him on the dissolution of marriage the *dos* was called *receptitia*. The *dos* was constituted by the transference of ownership either by a *stipulatio* or by the somewhat unknown verbal contract *dictio dotis*. The husband although in principle the owner of the dotal property could not alienate it (specially the immovable property) without the consent of the wise. The incidents of *dos* could be varied by special contracts.]

Quasi-contracts.

Justinian says,—"There are obligations which do not spring, properly speaking, from a contract, but they take their origin *as it were* from a contract." These obligations are termed quasi contracts. Thus if a person has managed the affairs of another in his absence, actions are available to both connected with the *negotiorum gestio* although these actions cannot be said to arise from a contract. A quasi-contract, generally speaking, gives rise to an obligation analogous to a contract-

ual obligation. The most noticeable feature of a quasi-contract is that it is not based on the consensus of the parties bound. As examples of quasi-contracts Justinian mentions the obligations of the tutors, the obligation in a *communi dividundo* when two or more persons have received a joint legacy and one of them has incurred necessary expenses for the thing, the obligation of a co-heir enforceable by an action for the partition of the inheritance (*familiæ erciscundæ*), the obligation of a person to repay money that has been paid to him by mistake. [In the case of money paid by mistake property must have been transferred under the belief that it was due.]

The general conception of an *obligatio* quasi ex *contractu*, as Buckland observes, covers those cases in which the intercourse of life sets up an *obligatio* without any contract and not resting on any wrong done.

Delict.

A delict is a violation of any of the rights *in rem* giving rise to an obligation enforceable by private actions. "It is not the evil intent which makes an act a delict. Many acts done with evil intent are excluded from delicts, many done without evil intent are included among them. Those acts

only were delicts which had been characterised and provided against as such by the ancient civil legislation and to which a particular action was attached." (Sandars). The principal delicts enumerated in the institutes of Justinian are (1) *furtum*, (2) *vi bona rapta*, (3) *damni injuria* and (4) *injiria*. [The *causa* of an *obligatio ex delicto* always consist of a fact —the delict of the debtor. Thus some jurists have remarked that the obligation *ex delicto* are always formed *re*.]

Furtum.

In modern system of law theft (*furtum*) is a crime and not a tort (delict). In Rome it was a crime as well as a delict. According to Justinian the word *furtum* comes either from *furvum* (black) because it is committed secretly and usually in the night or from *fraus* (taking away) which is connected with a Greek word meaning a thief.

Furtum manifestum and *nec manifestum*.

In the law of the XII Tables *furtum* is divided into two classes— *manifestum* and *nec manifestum*. Justinian has retained the same classification. "A manifest thief is one who is seen or seized by the owner or any one else in a public or private

holding the thing he has stolen before he has reached the place where he meant to take and deposit it. But if he once has taken it to its destination although he is afterwards taken with the thing stolen he is not a manifest thief." According to Gaius the jurists were divided in their opinion as to what constituted a *furtum manfestum*. The distinction, however, was of practical importance, because the penalty varied according as the theft was manifest or non-manifest. In the former case the thief had to pay four times the value of the thing stolen while in the latter case the condemnation was only for double value.

There might be a theft not only of a thing but also of use (*furtum usus*) or of possession (*furtum possessionis*) of a thing.

Furtum gave rise to a penal action called the *actio furti*. This was the sanction of the obligation *ex delicto*. As a result of the action the owner of the thing obtained a *poena* (a sum of money double or quadruple the value of the thing stolen). This action was available to the owner as well as to the *bona fide* possessor. In addition to the *actio furti* there was the *condictio furtiva* available only to the

Actions available for *furtum*.

owner. Condemnation for single value resulted from the *condictio.* The *condictio furtiva* might be brought against the heirs of the theif as well.

When a person took by force a thing belonging to another he was liable to a prætorian action called *vi-bonorum raptorum.* The theft by voilence was termed robbery and the prætorian action found a place in the civil law. It was available for quadruple value and under Justinian the action became *mixed i.e.* the recovery of the thing was included in the same action, consequently the penalty was only for three times the value. It was necessary that the act of voilence should be committed with evil intent. Thus if things were carried off violently under a mistaken belief that they belonged to the thief the *actio vi bonorum raptorum* was not available.

Vibona repta.

[But according to some writers later law provided that voilent seizure even in good faith should involve a penalty.]

The famous plebiscite *lex aquilia* established an action for damage wrongfully done. The first head say,—"If any one shall have wrongfully killed a slave or a four-footed beast, being one of

Damni injuria.

those reckoned among cattle, belonging to another, he shall be condemned to pay the owner the greatest value which the thing has possessed at any time within a year previously." This head was the foundation for actionable wrongs. It had reference to a wrongful act leading to the *death* of a slave or any quadruped reckoned among cattle. The owner had an action *damni injuriae.* Culpability did not arise out of mere negligence. In other words *damnum* was based on *injuria i.e.* unlawful act.

The third head covers a more extensive field of wrongs. It provides for every kind of damage done a slave or to four-footed beasts or to goods.

Actions for damni injuria.

Various actions were available for damni injuria. Some of these were prætorian in origin. The lex Aquilia itself fixed the penalty, in the case of wrongs contemplated under the first head, at the greatest value of the slave or animal killed at any time within a year. The penalty under the third head was limited to the greatest value of the thing within thirty days prior to the date of injury. As the action was penal it was not available against the heirs of the wrong-doer.

Injuria.

Injuria signifies in its general sense any act contrary to law. In a special sense as Justinian remarks, it means sometimes an insult (contumelia), sometimes a fault (culpa), and sometimes injustice. As the basis of liability, *injuria* means an outrage. An injuria is committed when any one is wounded or beaten or when possession is taken of the goods of any one on the pretence that he is a debtor to the wrong-doer although the latter knows that he has no claim. Various actions, civil as well as prætorian, were available to the party wronged. The penalty was proportional to the gravity of the offence. As injuria was called *atrox* (grave) either from the nature of the act or from the nature of the place or from the quality of the person. In the case of an *injuria atrox* the prætor fixed the maximum of the condemnation.

Quasi-delicts.

When a person was bound to make reparation as a wrong-doer although he could not strictly be said to be bound *ex delicto* he has said to be bound *quasi ex delicto.* "There was an evident analogy between the mode in which the obligation arose from other kinds of wrong-doing and that in which it arose from the kinds of wrong-

doing technically called delicts. The principle was exactly the same but the particular act did not happen to be among those technically termed delicts."

As examples of quasi-delicts Justinian mentions the case of a judge making a cause his own, the judge was bound *ex maleficio* ; the case of an occupier of an appartment from which anything has been thrown or poured down which has done damage to another, the occupier was bound *quasi ex maleficio* ; the case of the master of a ship or of an inn or a stable when damage was done through fraud or theft occuring in the ship, inn or stable. In all these cases the action was generally for double the value of the thing damaged or lost.

Examples.

Two points should be noticed in connection with delictual obligations. The first is that a delict in some cases did not entail a permanent obligation *e.g.* in the case of *injuria* already noticed. The second is that sometimes a delictual obligation was *permanent e.g.* a man did not cease to be liable for his delicts through *capitis deminutio.* It may also be pointed out "that a mere pact was a defence on an action for delict."

Peculiaries of a delict.

CHAPTER V.

SUCCESSION.

Succession in Roman Law.

Succession was a mode of acquisition *per universitatem* admitted and organised by the law as a necessary consequence of the death on individual. As the result of succession all the property, the rights and liabilities of the deceased passed to the heirs. The heirs were said to succeed to the *hereditas.*. So Savigny says "Succession does not apply to possession by itself."

Kinds of Succession.

Succession may be (1) testamentary, (2) *ab intestato* (legal). The succession was testamentary when the continuator of the *persona* was indicated by a document called the testament or will. In other cases it was *ab intestato.* (The alternative name legal in the last case was derived from the fact that the civil law determined the continuator of the dead man's *persona*).

Testamentary Succession.

The Romans, as Maine has pointed out, had a peculiar horror of intestacy. The testator consequently might appoint any number of heirs and give to them each a share of the *hereditas* provided that the

sum of these shares made up the whole hereditas; the maxim being *nemo peganus partim testatus partim intestatus decidere potest.* (No ordinary individual could die partly testate and partly intestate). The whole hereditas was counted in terms of a unit called *as* (pound). The *as* was divided into twelve parts called the *unciae* (ounces). The *as* represented an imaginary unit.

Institution.

The appointment of a *heres* (approximately on heir) was called the institution of an heir. When more heirs than one were instituted a rule called the rule of the *as* had to be observed with regard to the distributions of shares: *e.g.* if the testator did not mention the share of any of the heirs they took equally. Thus let A, B and C be my heirs, in this case each will have a third share in the *hereditas.* When the shares of all the heirs were indicated by the testator there was no difficulty as regards distribution if the parts indicated did not beyond twelve *e.g.* A and B are my heirs, A for two shares and B for three. In such a case A will get $\frac{24}{5}$ *unciae* and B will get $\frac{36}{5}$ *unciae* because the shares of A and B added together should make up 12 *unciae* (one *as*) and they should be in the proportion of 2 : 3. According to some here A will take two-fifths

of the inheritance and B three-fifths, the *as* in this case being regarded as made up of five *unciae*. (3) If the deceased indicated shares of some of the heirs but not of all, the *hereditas* had to be divided in accordance with the rule of the *as* *e.g.* if a will stated that A would get three shares, B five, and that C was a co-heir the distribution would be three *unciae* to A, five to B and four to C *i.e.* in such a case the *hereditas* would be divided into twelve parts and shares will be given to the persons instituted in the proportion of 3 : 5 : 4. But sometimes the testator in his appointment exceeded the number twelve *e.g.* he gave five shares to A, six to B, two to C and four to D. In this case the *as* was considered to be made up of 24 *unciae*, the next multiple of 12. After deducting from 24 the sum of the shares specifically mentioned the balance had to be distributed rateably amongst the persons instituted *e.g.* here after giving five *unciae*, six *unciae*, two *unciae* and four *unciae*, to A, B, C and D respectively, seven *unciae*, are left, so that A, B, C and D will get in addition to the above shares five-seventeenths of seven, six-seventeen, two seventeenths of seven and four-seventeenths of seven *unciae* respectively.

When some of the heirs appointed did not take their shares the others were entitled to the whole *hereditas* as co-heirs. If several heirs were appointed to receive the share of one heir who had failed to take they would divide the share rateably among themselves. This was known as the *jus adcrescendi.* An exception was made in case of persons who either did not marry or had no children, by the *lex Julia et Papia Poppea* which provided that a vacant share would not go to a celebate but to those in the will who had children, failing these it would go to the *fiscus.* But this law regarding a void bequest called the *jus caduca vindicandi* was abolished by Justinian. In his time the ordinary rule of accretion prevailed.

Jus adcrescendi.

Substitution was one of the means by which successive *hereditas* could be given to persons other than those mentioned in the first instance in case these failed to take. Such substitutions were commonly divided into three kinds:—(1) Ordinary or common substitution (*substitutio vulgaris*). This was simply a conditional institution of a second or a third heir in case the first heir instituted would not or did not take the

Substitution.

inheritance *e.g.* I institute A my heir and if A should die before the succeeded me B should be my heir. (2) Pupillary substitution. When a *paterfamilias* made the provisions of an heir to a child *in potestate* who should survive the testator but die too young to make a will for himself the substitution was known as pupillary substitution. Here the *paterfmilias* made two wills so to say. He was concerned however more with the will or succession of his son under power than with the will of himself. As the substitution dealt with the child's inheritance it might be effectively made even in the case of a disinherited child. (3) Quasi-pupillary or exemplary substitution. Under Justinian when a *paterfamilias* instituted an heir to an insane son the substitution was known as exemplary or quasi-pupillary. [Fiduciary substitution. According to some a fourth kind of substitution known as fiduciary substitution ought to be added to the above. But fiduciary substitution relates more to a *fideicommisum* than to a will proper *e.g.* when A was allowed to hold as a beneficiary some property for the life of the testator and on the latter's death had to give it to B.]

Bonorum Possessio.

Sometimes the prætor gave the possession of the whole estate of a deceased person to an individual called the *bonorum possessor* (possessor of goods). He was not the heir because the prætor could not directly legislate and make a person heir against the civil law but he was given possession and an action to retain that possession called *quorum bonorum.* After the expiry of a definite time the bonorum possessor had quiritary ownership of the *hereditas.* In the time of Justinian the distinction between a *bonorum possessor* and a *heres* was not always maintained.

Classes of heirs.

Heirs were divided into three classes *viz.* (1) *Sui et necessarii.* (2) *Necessarii* (3) *Extranei.* The first two classes consisted of those who became *heredes* by direct operation of law irrespective of their consent, the *extranei* were those who might accept or reject the *hereditas* as they thought fit. Thus the sons and daughters or other descendants *in potestate* came under the first head, a slave who was instituted by his master as his heir came under the second head, all strangers instituted as heirs came under the third head.

It is necessary to distinguish five periods in the history of the Roman wills. The first period dates back to the early days of the city. The will in this period was in form a legislative act. It was called a testament *in comitiis calatis*. In the *comitatia calata* the *populus* voted on the will. The will *in comitiis* was, however, a Patrician will. It was not available for the Plebeians.

History of testaments. First period.

The second period begins with the appearance of the mancipatory will. This was a will *per aes et libram*. There were three stages in the development of the mancipatory will. In its initial stage the hereditas was conveyed out and out. The *familiae emptor* (the purchaser of *familia*) was the heir. He took the conveyance to himself of the whole *hereditas*, the process being effected by means of copper and scale. During the second stage the mancipatory will was irrevocable just as in the first stage and it was public but the *familiae emptor* became the heir after the death of the testator. So in the second stage the will became effective on the death of the testator. In the third and the final stage the *familiae emptor* and *heres* are not the same person. The will

Second period.

was secret, revocable and operated on death. The *familias emptor* undertook to distribute the property to the persons named in the will.

Third period.

The third period is marked by the appearance of the prætorian wills. These wills were introduced by the prætor and hence the name. The praetorian will was executed simply by showing it to seven witnesses who sealed it with their seals. This form was derived from the mancipatory will. In fact it was a mancipatory will modified by deformation, the five witnesses the balance-holder (*libripens*) and the *familiae emptor* being replaced by seven witnesses.

Fourth period

The prætorian will seems to have disappeared with the creation of the non-cupative wills making the beginning of the fourth period. This was the simplest form of the will and prevailed during the latter half of the empire. This will was made by a simple declaration of the testator before certain witnesses without showing them the contents of the will. It was sometimes made by an entry on the public records.

Fifth period.

The fifth period coincides with the Byzantine period of the Roman history. The testator declared his intention

before seven witnesses who had to sign the will (*subscribere*) and affix their seals to it (*signare).* The testator also had to subscribe to the will. This will was called the tripartite will because the formalities were derived from three distinct sources *viz.* (1) from the civil law which was the basis for the assembling of the witnesses and for the performance of the juristic act as one act, (2) from the prætorian law which was the basis for the affixing of the seals of the witnesses, (3) from the imperial constitution which was the basis for the internal signatures of the testator and of the witnesses.

Informal wills.

The five periods just mentioned refer to the formal wills. Besides these, there were certain wills called the informal wills. Soldiers, provincials and some other privileged persons were allowed to make wills without any formally, *e.g.* soldiers, drawn in battle array could leave their property to heirs by simple words of mouth. The will by a soldier under these circumstances was called the will in *procinctu.* The heir in such a will was indicated by "parole significations." Peasants, villagers, and the people in time of pestilence could make informal will.

Testamenti-factio.

The high value which the Romans set on the right of testation is evidenced by the rules regarding *testamenti factio.* This expression has three meanings (1) competency to make a will which is termed *testamenti factio activa,* (2) competency to take property by virtue of a will, this is called *testamentifactio passiva,* (3) competency to become a witness to a testament. Minors lunatics, prodigals, the deaf and dumb lacked the *testamenti factio activa.* Sons *in potestate* had no power to make a will except in relation to their *peculium castrense* or *quasi-castrense.* Till Hadrian's time a woman in *legitima tutela* could not make a will even with her tutor's consent. Some persons were said to have the *testamenti factio* although they might not be able to make a will, they had it *passiva.* These could become the legal objects of the testator's thoughts in his will. Women, *impuberis,* slaves, deaf and dumb persons were held to be incapable to witness a will. The consequently lacked *testamenti factio* in the third sense of the term. It was an essential requisite to a valid testament that the heir should possess the *testamenti factio passiva,* consequently unborn persons could not take under a will

although they could be disinherited. [The *testamenti factio passiva* should exist with the heir at the time of making the will, at the time of the opening of the succession and at the time of accepting the succession. The *testamenti factio activa* should exist at the time of making the will and at the time of the death of the testator].

Invalidation of wills.

A will could become void in any of the following ways:—(1) A will could become *nullum ab initio i.e.* void from the beginning. This might happen *(a)* because the testator had not the *testamenti factio activa* or the heir had not the *testamenti factio passiva*. In such a case the will was *nullum*. *(b)* It might happen that the will did not comply with some of the formalities. In other words the will was not made in accordance with the law *(injustum* or *noujure factum)*. (2) It might become *ruptum*. When a will became void on account of an event occurring after the execution of the will *e g*. the birth of a *suus heres* who was not expressly disinherited, it was said to be *ruptum*. (3) *Irritum*—A will might be revoked by the fact that the testator became *capite minutus* after the execution of the will. In such a case the will was said to

be *irritum*. (4) *Inofficiosum* or *rescissum*. When the will was annulled because it did not give a share to those who should have had a definite share of the *hereditas*, it was said to be *inofficiosum*. (5) *Destitutum*. When the heirs mentioned in the will did not or could not take under the will, the will was said to be *destitutum* *i.e.* a will with no one to take under it.

Testamentary power.

Prior to the time of the XII Tables the testamentary power of the Romans was limited on account of the co-proprietory character of the family property. At the time of the XII Tables, however, the testamentary powers were very extensive. The Tables say "as a man shall determine regarding *tutela* and *pecunia* so shall be the law." Some hold that this liberty of testation referred to the *res necmancipi*, because *pecunia* was opposed to *familia* and *familia* consisted of the *res mancipi*. The testamentary powers were later on restricted through the rules about:—(1) Institution of heirs. (2) Disinherison. (3) *Querela inofficiosi testamenti*. (4) Falcidian portion. (5) The *legitim*.

Institution of heirs.

No will was valid unless one or more persons were appointed heirs. Uncertain persons, *e.g.*, the unborn could not be instituted.

Disinherison.

The *paterfamilias*, who did not leave the *heriditas* to the *sui heredes*, had to disinherit them formally. At first sons under power had to be disinherited *nominatim* (by the name) and daughters and grand children could be disinherited *inter ceteros* (*i.e.* in general terms), *e.g.* Titius shall be my heir and all others are excluded, here "all others" includes daughters and grand-children. Under Justinian all descendants in the male line entitled to be called to the succession and all children, whether emancipated or not, had to be disinherited *nominatim.* Only the living could be disinherited in general terms. If a *suus heres* was born after the will was made he was called a *posthumus.* In order that a will might not become invalid by the birth of a *posthumus*, certain classes of *posthumi* could be disinherited by virtue of enactments civil and prætorian. A person *sui juris*, dying without descendants, had to disinherit in his will his ascendants both paternal and maternal.

Inofficiosity.

Querela inofficiosi testamenti seems to have been of customary origin and was heard at the beginning of the empire by the centumviral court. This tribunal always upset the will in which the *sui heredes*

had been disinherited; the will in such a case was supposed to have been executed by an insane person. The action by which a *suus heres* upset the will was called the *querela inofficiosi testamenti* (the plaint of an unduteous will). Under Justinian the *querela*, when successful, did not upset the will; the effect was that the institution of heirs was rescinded, but the legacies and other provisions of the will remained intact. Justinian allowed the *querela* to be brought only when the *sui* had been wholly passed over. If one of the children was justly excluded and the others were successful in the *querela*, the testator died partly testate and partly intestate, contrary to the general rule. When the institution of heirs was wholly set aside, the succession took place *ab intestato*. The *querela* was excluded (1) when the right was waived, (2) by direct approval, (3) by prescription, at first of two years and finally of five years.

Falcidian portion.

By the *lex Falcidia*, passed in the reign of Augustus it was laid down that no one should leave in legacies more than three-fourths of his estate, so as to give the heir at least one-fourth of the succession. This portion reserved to the

heir was called the *Falcidian* fourth (*quarta Falcidia*). As legacies could be given by codicil, so that they were payable by an heir *ab intestato*, the *Falcidian* portion could be claimed by him just like a testamentary heir. If legacies exceeded three-quarters of the succession, they were proportionately reduced in favour of the heir.

Legitim.

By the rule about the legitim, the parents had to leave a certain portion of the *hereditas* to the children and the children to their parents. The portion, called the legitimate portion was originally fixed at one-forth the succession, *i.e.* at one-fourth of the estate that would have fallen to the heirs *ab intestato*. (It may be noted in this connexion that in the case of the *Falcidian* fourth the value of the estate was calculated after deducting debts and necessary expenses—while in the case of the legitim the gross value of the estate was taken). Justinian raised the legitim to at least one-third when there were at most four heirs and to half when there were more than four. Legitim was due after the death of the testator and therefore those who claimed it had to render an account of what they had received as heirs or by legacy or by a *donatio*

martis causa. Under Justinian legitim had to be left to the children as heirs and not as *legatees* or *donees*, and if any part of inheritance was left to them they were entitled to bring an action for recovery of what was necessary to make up the legitim ; this action was called the action for supplementing the legitim.

Intestate succession.

The will at least in early law was exceptional, and intestacy, although looked upon with horror, was not unusual. When a person died without a will the law appointed successors to his property according to certain rules. These rules were the rules of intestate succession (*successio ab intestato*).

Rules of intestate succession.

Many of the rules of the testamentary succession apply to succession on intestacy. Three points, however should be specially noticed. (1) When does the succession open ? As a general rule the date of opening does not coincide with the date of death, because it must be first of all clear that the deceased has left no will. Naturally the succession in this case cannot open immediately. Again it may be that the deceased has left a will but the *heres* instituted may refuse to accept the

inheritance and as this was done usually after a certain period called "the time of deliberation," intestate succession would begin at the end of that period. (2) Who are the persons who may be called to the intestate succession and who are the persons whose succession may take place *ab intestato?* As the rules of intestate succession are statutory rules the persons who may succeed or who may leave a succession *ab intestato* are determined by the civil law. (3) What is the order in which the persons entitled are called to the succession? There are four classes of rules regarding the order of intestate succession ;—(*a*) the rules of the XII Tables, (*b*) the praetorian rules regarding *bonorum possessio* (*c*) the *senatus consulta* and the constitutions of the emperors, (*d*) novels of Justinian.

The rules of the XII Tables.

By a famous section of the XII Tables, succession on intestacy went in the first instance to the *sui heredes*, failing the *sui heredes* it went to the agnates in equal proportion, failing the agnates the *hereditas* went to all members of the *gens* of the deceased. By another rule (probably posterior to the XII Tables) in the case of women agnates, unmarried

sister of whole blood were only entitled to succeed *ab intestato*. No other female agnates of a remoter degree were admitted. [It should be noticed in this connexion that these rules of civil law applied only to the *ingenui*, as regards the *libertus* the order of succession was (1) *sui heredes*, (2) patrons and their children, (3) *gentiles* of the patron.

Prætorian order.

The order of calling persons to the goods of the deceased *i.e.* the order of giving *bonorum possessio* falls under two heads, (1) the order with regard to the *ingenui*, (2) the order with regard to the *libertini*.

1. The *ingenui* were called by the prætor as follows :—

(i) *Unde liberi*, *i.e.* the possession of goods went in the first instance to all the children emancipated as well as unemancipated.

(ii) *Unde legitimi*. If the children failed to take, the possession went to the agnates and those to whom the possession would have been given along with the agnates.

(iii) *Unde cognati*. If the agnates failed, the possession went to the cognates *i.e*, to the blood-relation in order (*secundum ordinem*).

(iv) *Unde vir et uxor*. Failing the cognates the possession went to the surviving widow or widower.

II. In the case of the freed men the order of *bonorum possessio* was slightly different. After the third class (cognates) possession was given to the nearest members of the family of the patron. In default of these reciprocal rights of succession were given to husband and wife. [*Bonorum possessio* was said to be *contra tabulas* when it was given to children passed over in the testament and it was called *secundum tabulas* when possession was given to the legally instituted heirs. The *possessio secundum tabulas* was not given until after the *possessio contra tabulas*.

Some times the prætor gave *bonorum possessio* to some one against the superior rights of a legal heir, the latter was allowed to keep the *bonorum possessor* out of possession and the possession (here worthless) was said to be given *sine re* (without the goods). When the selection of the *bonorum possessor* did not violate the civil law rights of another or when the prætor maintained the *bonorum possessor* in possession of the property against the superior rights of a legal heir, the possession was said to be given *cum re*. Emancipated children when called *unde liberi* were obliged to bring into hotchpot what they had acquired since

emancipation except the *peculium castrense* and *quasi-castrense.* This was called *collatio bonorum.*]

Justinian by his two novels, 118th and 127th, completely modified the order of intestate succession. The difference between *bonorum possessio* and *hereditas* was abolished, and the distinction between the agnates and the cognates was entirely removed. The different classes of heirs were called in the following orders :—

Novels of Justinian.

(1) The Descendants (*descendentes*).

(2) The ascendants (*ascendentes*).

(3) The collaterals (*ex latere venientes*).

The descendant came first. The expression descendant was now used in its general sense, that is to say *patria potestas* was not taken into consideration in finding out this class. Thus the descendants were called not only to the succession of the father but to that of the mother. The succession was divided *per capita* when the descendants were in the first degree, but when in the second the division was *per stirpes* (by the stock).

Descendants.

The ascendants were called in default of the descendants and without any distinction of sex or of degree.

Ascendants.

The nearest ascendant excluded the more remote. Thus the mother excluded the maternal grand-father. When there were brothers or sisters of the whole blood, the ascendants shared the inheritance with them, each person taking an equal share.

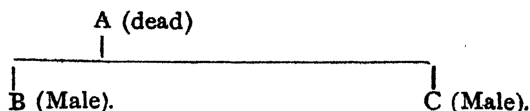
Collaterals.

Justinians put the collaterals under two classes :—(*a*) privileged collaterals, (*b*) ordinary collaterals. The brothers and sisters of the whole-blood and their descendants were the privileged collaterals. Brothers and sisters of the half-blood and their descendants were ordinary collterals. The privileged collaterals excluded the ordinary collaterals. The children of a deceased brother or sister represented their deceased parent and took the share that parent would have taken, but no representation was allowed of grand children. If there were no brothers or sisters or children of brothers of sisters, the nearest relation in whatever degree succeed. The division in the case of relations in the same degree was always *per capita*.

[The following examples suggested by Maynz clearly illustrate the rules of intestate succession introduced by the *novels* :—

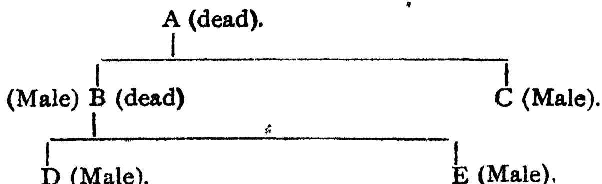
I. First class—Descendants.

(i)



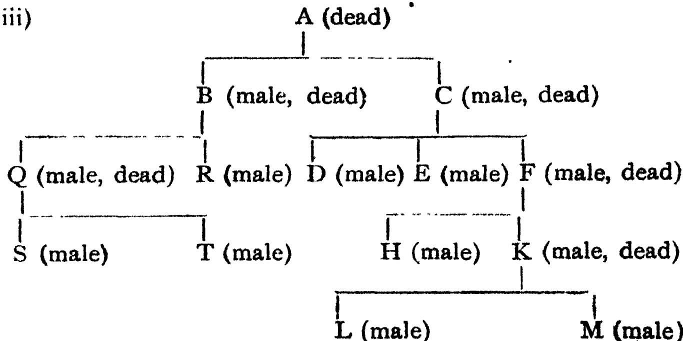
Here B and C get $\frac{1}{2}$ the inheritance each.

(ii)



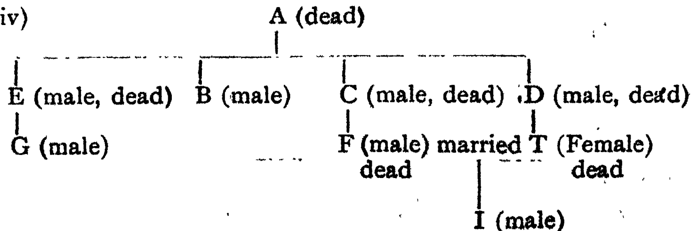
Here C gets $\frac{1}{2}$ the inheritance and D and E get $\frac{1}{4}$ each.

(iii)



Here R gets $\frac{1}{4}$; S, T, each $\frac{1}{8}$; D, E, each $\frac{1}{6}$; H gets $\frac{1}{12}$; L and M each $\frac{1}{24}$.

(iv)



Here B gets ¼ ; G ¼ ; I gets ½ ; ¼ through F and ¼ through T.

II. Second Class—Ascendants.

(i)
```
        A married B        F married G
        |                  |
        C (son) married    D (daughter).
                   |
                   P (male, dead).
```
Here C and D each get ½ the inheritance.

(ii)
```
        A married B            F married G.
        |                      |
        C (male) married       D (female, dead).
                   |
                   P (male, dead).
```
C gets the whole inheritance.

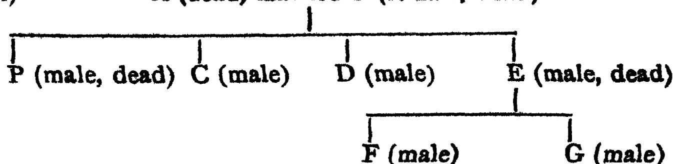
(iii)
```
                                     X married Y
                                             |
C married D              M married, (dead) N (female dead)
    |                                |
    A (male, dead) married           B (female, dead)
                      |
                      P (male, dead).
```
C and D each get ½.

(iv)
```
C (dead) married D (female).   E male married F (female)
            |                            |
            A (male, dead) married B (female)
                               |
                               P (male, dead)
```
Here D gets ½, E and F ¼ each.

III. Third class—Collaterals of whole blood.

(i)
```
        (dead) A married B (female, dead)
                    |
     ------------------------------------
     |                  |               |
P (male, dead)      C (male)        D (male).
```
C and D brothers of P get ½ each.

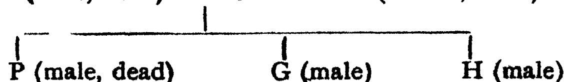
(ii) A (dead) married B (female, dead)



Here C and D get $\frac{1}{3}$ each and F and G get $\frac{1}{6}$ each.

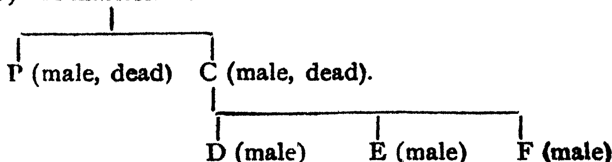
(iii) C married D (female) E (dead) married F (female)

A (male, dead) married B (female, dead)



Here C, D, F, G and H get $\frac{1}{5}$ each.

(iv) A married B.

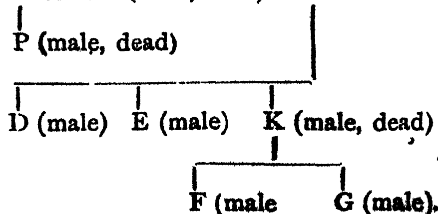


Here A and B get $\frac{1}{3}$ each, D, E and F get $\frac{1}{9}$ each.

IV. Fourth Classes.—Ordinary Collaterals.

(i)

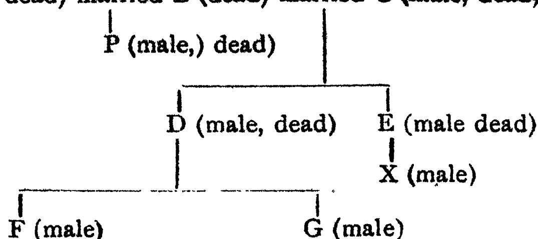
A (female, dead) was married to B (male, dead) married C dead



Here D and E get ^{1} each, F and G get $\frac{1}{6}$ each.

(ii)

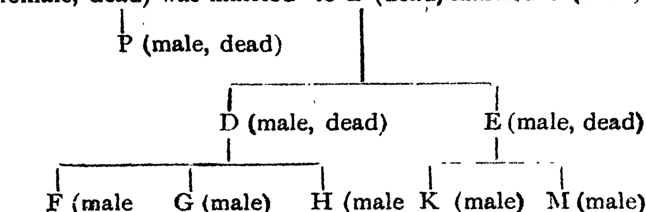
A (male, dead) married B (dead) married C (male, dead)



E gets ½, X gets nothing, F and G each get ¼.

(iii)

A (female, dead) was married to B (dead) married C (dead)

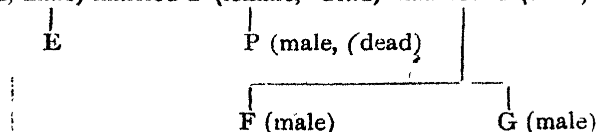


F, G, H, K and M get $\frac{1}{5}$ each. (Here there is some conflict of opinions.)

(iv)

[married D (dead)

A (dead, male) married B (female, dead) married C (dead)



Here E, F and G gets $\frac{1}{3}$ each.]

CHAPTER VI.

LEGACIES AND FIDEICOMMISSA.

Singular Succession.

Besides the universal succession described in the last chapter the Roman admitted a second kind of succession called the particular or the singular succession. Here the successor was not a *heres*, he did not stand in the shoes of his predecessor but got specified rights with regard to a specific thing. A singular succession, therefore, never operated by transferring the *persona* from one individual to another. Legacies and *fideicommissa* are the chief instances of singular succession.

Legacies.

A legacy is defined by Justinian as a kind of gift left by a deceased person (*Legatum itaque est donatio quædam a defuncto relicta*). This gift might be of a part of the *hereditas* or of a particular object. The legacy in the former case was called partial and in the latter case particular. It must, however, be remembered that the gift of the partial *hereditas* did not turn legatee into a *heres*, because, as already noticed a legatee was not a continuator of the *persona*.

A legacy might be given in one of the four forms: *per vindicationem*, *per damnationem sinendi modo* and *per præceptionem*. There was a certain form of words, proper to each of these, by which they were originally distinguished from one another.

Forms of legacy.

The formula in this case ran thus:—

Per vindicationem.

Titio do lego (I give a legacy to Titius). This legacy was termed *legatum per vindicationem* because as soon as the heir entered on the inheritance, the legatee could claim his portion by the action of *vindicatio* Gaius has pointed out that the testator could only give *per vindicationem* the things of which he had quiritary ownership both at the time of making the will and of his death.

The formula in this case ran thus:—

Per damnationem.

Heres meus damnas esto dare. (Let my heir be condemned to give). The legatee had a personal action against the heir to compel him to the performance of what the terms of the legacy directed.

The legacy *sinendi modo* had for formula:

Sinendi modo.

Heres meus damnas esto sinere Titium sumere (Let my heir be condemned to allow Titius to take.........). The heir was bound by the formula to allow

the legatee to take the thing left as a legacy. Here also, as in the case of legacy *per damationem*, the legatee had a personal action against the heir, consequently in both the instances the legatee was not a *real* owner.

Per praeceptionem.

The formulla for this was :—*Titius illam rem praecipito* (Titius is to take that thing before hand). In this form a legacy was generally given to a coheir who had the right to take the thing given *before the partition* of the *hereditas.* According to Gaius "by a mistake in language this form was applied" to a legacy to a non-heir. There is a difference of opinion as to the proper action for his form. Some say that the action was a *vendicatio.*

Disappearance of formalism.

The division of legacies into four classes although theoretically retained, lost its practical value when Constantine abolished the use of *formulae* in all legal acts. Under Justinian the formalism completely disappeared. He says in the Institutes: We, also, desirous of giving respect to the wishes of the deceased persons and regarding their intentions more than their words, have, by a *constitution*, enacted that the nature of all legacies shall be the same and

that legatees, whatever may be the words employed in the testament, may sue for what is left them, not only by a personal but by a real or a hypothecary action." (II. 20. 2.)

Fideicommissa.

Fideicommissa owned their origin to the stringency of the ancient law of wills. "The primary purpose of *fideicommissa* was the making of gifts by will to persons who had not *testamenti factio* with testator." In the early days of the Empire such gifts were common and Augustus authorised the consuls to enforce these informal gifts in certain cases because the testator had begged the beneficiary to carry them out. The testator did not directly address the person intended to be benefited but asked the heir to execute his intention formally. He committed the matter to the "good faith" of the heir or other beneficiary, hence the name *fedeicommissum.* The person who made it was called the *fideicommittens*, the person charged with the execution was called the *fiduciarius* (fiduciary), the person to be benefited was called the *fideicommissarius* (fideicommissary). A fideicommissum might refer to the whole or a part of the *hereditas.*

The fideicommissum of the whole or of a

Fideicommisum of *hereditas.*

part of the succession is to be distinguished from a particular fideicommisum in one important respect. The latter cast no further burden on the fiduciary than the execution of the trust reposed in him, but the former cast the obligation to pay the debts of the deceased on the fiduciary, while the fideicommissary received the succession free from all charges because he was not a *heres.* To avoid this difficulty the fiduciary made a stipulation that the fideicommissary would pay up the debts of the *hereditas.* This remedy was, however, ineffectual if the fideicommissary was insolvent, consequently the *Sc. Trebellianum* provided that after an inheritance had been restored under a *fideicommisum,* all actions which by the civil law might be brought against the fiduciary (generally the *heres*) should be permitted for and against the fideicommissary. This measure protected the fiduciary from any harm, but it was no inducement to him. So to incite the *heres* to enter on the inheritance the *Sc. Pegasianum* was passed. This allowed the instituted heir to retain a fourth of the inheritance. Justinian united "the two *senatus consulta* into one, giving them the name of the

Sc. Trebellianum. The heir was to retain a fourth as under the *Sc. Pegasianum*, but actions were to be brought for or against the heir and the *fideicommissarius* in proportion to their shares." (Sandars). Thus legacies and *fideicommissa* were put on the same footing.

Difference between a legacy and a *fideicommitssum.*

A *fideicommissum* differred from a legacy in the following respects:—*(a)* It might be in a non-confirmed condicil. [Originally *fideicommissa* were generally in wills. "But a certain Lucius Lentulus having made Augusts one of his *heredes*, imposed certain *fideicommissa* on him and others by codicil. Augustus ordered his to be carried out, and other fiduciaries, or some of them, then did the same. Augustus then invited the opinion of lawyers as to whether these codicils out to be legally recognised. Trebatius thought they should be as being very convenient, for instance, when a man was travelling in remote regions. Labeo actually made codicils, and they were thereafter accepted as legal."—Buckland].

(b) A legatee might be charged with the execution of a *fideicommissum* but *a legatario legari non-potest.* (There could not be a legacy from a legatee).

(*c*) A *fideicommissum* was always in the form of a request.

[In fact Justinian enacted "whatever was wanting to legacies they would borrow from *fideicommissa*." Thus if a gift was in form *imperative* it was a legacy, if it was *precative* in form it was a *fideicommissum*.]

(*d*) A *fideicommissum* did never give any right to a real action.

Restrictions on fideicommissa.

The powers given by the introduction of *fideicommissa* were very extensive. The testator could benefit those who could not have taken direct gifts. Moreover by a *fideicommissum* a gift might be made even without a testament at all. A man might give away the whole of his inheritance in legacies and fideicommissa leaving nothing for the heirs. Restrictions were, however, gradually imposed by different enactments. Hadrian took away the power of giving *fideicommissum* to a peregrin. By the Sc. Pegasianum (A. D. 73) the *fideicommissa* were subjected to the ordinary law as to the celebates. In the time of Justinian, as already remarked, they were put on the footing of legacies.

Dies cedit and *dies venit.*

In connexion with the acquisition of *legacies* and *fideicommissa* two critical points of time are to be considered —when *dies cedit* and when *dies venit.* The first means the day is *coming* and the second the day *has come* ; on the occurrence of the first the gift becomes *vested*, on the occurrence of the second it is demandable by an action. When the *dies cedit* the destination of the gift is determined, *e g.*, a legacy is made to a slave X owned by A at the date of the will, but when the will is opened at the death of the testator, B is the owner of X, the legacy will go to B through X. For legacies pure and simple the *dies cedens*, according to Paul, coincided with the day of the death, for conditional legacies the *dies cedens* was the day of the fulfilment of the condition. The *dies veniens* was for pure add simple legacies the day of the *aditio* of *heriditas* for conditional legacies the *dies veniens* was the day of the fulfilment of the condition only if the latter was posterior to the day of *aditio.* It is event that the *dies veniens* may be produced in certain cases arter the *aditio* of the hereditas, but never before, because up to that time the existence of the will may be in question and with it the existence of the legacy.

["The law as to the causes and effects of failure of gifts in will," remarks Buckland "was subject to great changes. The most profound alteration was that caused by the caducary laws. By the *lex Julia et Papia Poppea* all the vacent share *(caduca)* went to those *hœredes* who satisfied the requirement of the *leges* already noticed, *i.e.*, had children or were ascendants or descendants of the testator, failing these they went to the *fiscus*."

There are many other details regarding legacies and *fideicommissa*, which may be passed over in an elementary course.]

CHAPTER VII.

ACTIONS.

Action.

According to Justinian "an action is nothing else than the right of suing before a Judge for that which is due to a party." In its etymological signification it denotes the putting of the law into motion (from *agere*—to act). By a figure of speech, as Ortolan points out, it came to signify the *right* of exercising the recourse to authority. In a third sense it was used as a synonym of procedure. The word changed its meaning with the successive changes in the Roman Judicial and legal procedure. In short the law of actions is adjective law. (In an introductory course like the present it is best to deal with the historical side alone of the complicated Roman *actiones*).

Successive systems of procedure.

Three epochs characterised by three systems of Judicial procedure are to be distinguished in the history of Roman Law. These systems were:—

(i) The system of the *legis actiones*.

(ii) The formulary system.

(iii) The extraordinary system.

The first two are dominated by the *ordo judiciorum*, that is to say the distinction between the magistrate and the judge was the key-note. Strictly speaking what we call the judiciary did never exist as a separate body in Rome. The prætors and other superior magistrates exercised both judicial and executive powers. The *judex*—a judge of a particular law suit—was only an arbiter appointed generally by the magistrate. The *ordo judiciorum* derived its name from the fact that a suit was divided into two parts. In its preliminary, or the first stage, it was organised by the magistrate. He settled the *issue* and the suit was said to be *in jure*. The magistrate after organising the suit sent it to the judex—the suit now entered the second or final stage and was said to be *in judicio*. The judex gave the judgment. With the abolition of the *ordo judiciorum* appeared the extra-ordinary system—a system simpler but less elegant that the old procedure. Gaston May observes that the extra-ordinary procedure indicates the decay of scientific spirit in Rome.

Legis actiones.

The main feature of the *legis actiones* (actions of law) was the employment of solemn symbolical forms

with verbal expressions. The legis actio, in other words, was a formal ceremony that began *in jure* before a magistrate and was terminated *in judicio* before a judex. The functionaries connected with the 'actions of law' were the magistrate at Rome, the pro-consuls in the provinces, the judex (eligible from the senators) and the *recuperatores*.

The details of the different *legis actions* are not definitely known. Gaius says that they were five in number and were called the actions of law (*legis actiones*) either because they were of legal, as opposed to the prætorian, origin or because those actions were accommodated to the very words of the laws and consequently were as unchangeable as the laws themselves. (Cf. the example of *vites* v. *arbores* in Gaius. 4. 11.) [Two terms should be noted in this connexion—*jus* meaning the right the law or the will, and *judicium* meaning the tribunal or the proceeding by which the right was enforced.] The *legis actiones* mentioned by Gaius are the *sacramentum*, the *judicis postulatio*, the *condictio*, the *manus injectio*, the *pignoris capio*. Of these the first three were forms of procedure, the last two were modes of execution.

The *sacramentum* or the *legis actio sacramenti*

The five action of law.

was the oldest form of procedure. It was of general application, "for as to all things, for which the law had not given a special action, the *actio sacramenti* was employed." (Gaius). It derived its name from the *sacramentum* or sum of money which each litigant was obliged to leave in the hands of the college of pontiffs and which was forfeited by the defeated party. The *sacramentum injustum* (*i.e.*, the money of the defeated party) was devoted to the purposes of the *sacra publica* (*public worship.*) [It may be remarked that the commentators have pointed out that the issue depended on the declaration. "This thing is mine." Cf. :—

ममेदमिति योब्रूयात्सोऽनुयोज्यो यथाविधि ।
संवाद्य रूप संख्यादान्स्वामी तद्द्रयमर्हति ॥

One who says "This belongs to me" must be strictly examined according to rule ; and on his declaring correctly the shape, number, and other (characteristics), he ought as owner to receive those goods.—Manu 8. 31. (Burnell)]. The *judicis postulatio* owes its name, according to Valerius Probus, to the formula by which the demand to the magistrate was made for the appointment of a judge or an arbiter. The

formula ran J. A. V., P. U. D. (Judicem Arbitrum Ve Postulo Uti Des—I demand that you give me a judge or an arbiter). Nothing more is known about this system.

The *legis actio per condictionem* or simply *condictio* was introduced by the *lex Sillia et Colpurnia* of uncertain date and was confined to the prosecution of obligations. It derived its name from the *condictio* (a term, according to Festus, connected with *dicendo denuntiare*) the formal notice given by the plaintiff to the defendant to appear on the thirtieth day thereafter for the appointment of a judex. The *manus injectio* (the bodily seizure of the person of the debtor) and the *pignoris capio* (the seizure of the goods of the debtor) were as already pointed out, auxiliary measures for carrying into execution the sentence pronounced by a court. The last one was, however, available even without a judgment. Girard says that the *pignoris capio* was an extra-judicial procedure—a procedure unconnected with an action in the modern sense of the word.

The formulary procedure.

The *legis actiones* were abandoned when the legal forms designed originally for the peregrins came to be generally used by the citizens.

They were formally abolished by the *lex Aebutia* and the lex *Julia.* The old ceremonials gave place to arguments before the magistrate *in jure.* He delivered a *formula* to the parties and the judex decided the case according to the *furmula.* Hence the name formulary procedure.

Extra-ordinary system.

The old constitution of Rome ceased to exist at the time when the government became imperial. The constitutional changes effected corresponding changes in the judicial power and the form of procedure. The distinction between *jus* and *judicium* had ceased and the institution of the judge and the construction of the formula for each case had consequently disappeared. "The plaintiff denounced his adversary directly to the clerk or registrar of competent authority. The magistrate by his bailiff acquainted the defendant of the charge brought against him and in due course he himself tried the case." (Ortolan) The procedure was termed extraordinary because even before its institution such a procedure was allowed under exceptional circumstances, *e.g.*, the presidents of the provinces, when passed for time, were allowed to remit cases of minor importance to

inferior judges who settled the issue and gave judgment. What was originally the exception became the rule. Hence the name extraordinary procedure.

Actions *in rem* and *in personam*.

In conclusion a remark must be made on the signification of the term *actio* under the formulary system. The word was sometimes used as a synonym of formula. The part of the formula known as the *intentio* set forth the claim of the plaintiff and contained all the elements indicating his legal rights. Hence actions were divided into two classes—*in rem* and *in personam*—according to the contents of the *intentio*. If the *intentio* mentioned the person of incidence—the passive subject as the Romans said—the action was in personam, if it did not mention any passive subject but simply contained the claimant and the object of the right the action was *in rem*. The formulary system has disappeared long ago but its relics are the permanent possession of jurisprudence.

[Certain other classifications of actions may briefly be noted. These are :—(1) civil actions (*actiones civiles*) and prætorian actions (*actiones prætoriae*). The civil actions were so called because they were derived from the *jus civile*

and the prætorian actions owed their origin to the activity of the prætors. The prætorian actions must be distinguished from the *interdicta* (interdicts). The interdict emanated from the magistrate as an act springing from his right to publish edicts. It was chiefly employed in connexion with private rights when matters were urgent. The Interim injunction of modern law may in some respects be compared with a prætorian interdict. The most important interdicts were those called the possessory interdicts. Although the prætor turned possession into a substantive right with the help of interdicts they did not replace the *actia*, on the contrary they gave birth to it. "The possessory and the quasi-possessory interdicts furnished the provincial remedy and determined which of the two parties was to be the plaintiff and which the defendant in a litigation." (2) *Stricti juris bonaefidei*, and *arbitrariae actiones*. In *stricti juris* actions a definite thing was claimed and the condemnation was for a definite sum. In the *bonafidei* actions the judge was allowed to apparaise the value of a claim. In ihe *arbitrariae actiones* the Judge played the part of the arbitrator. (3) *Directae actiones* and *utiles actiones*. The

utiles actiones were the actions modelled on the already existent actions. All other actions were called the *actiones directae.* The *actiones utiles* were either civil or prætorian. These were sometimes treated as a sub-class of the group of actions called the *actoiones in factum.*]
